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Supreme Court, U.S.
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**IN THE**

**SUPREME COURT OF THE UNITED STATES**

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**SUPERIOR PROTECTION, INC.,**
**Petitioner,**

**v.**

**N.L.R.B.**
**Respondent.**

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1.

Whether the certification by the National Labor Relations Board (the "Board") of a collective bargaining unit of security guards employed by a GSA contractor almost two years following a representation election was an illegal accretion in violation of the National Labor Relations Act, 29. U.S.C. Section 151, *et. seq.* (the "Act"). In this case, a majority of the guards included within the description of the certified unit did not become employed until after the election, when the employer acquired additional locations by successfully bidding on another GSA contract, following which the employees working under both contracts were merged into a single unit.

## STATEMENT OF INTERESTED PARTIES

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit were:

Superior Protection, Inc. - Petitioner
Michael Jay Kuper - Counsel for Petitioner
Raymond L. Kalmans - Counsel for Petitioner
National Labor Relations Board - Respondent
David Seid - Counsel for Respondent
Aileen Armstrong - Counsel for Respondent
Meredith Jason - Counsel for Respondent
Curtis Wells - N.L.R.B. District 16 - Regional Director
James Carney - USGOA Local 1225 President

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is at 401 F.3d 282 (5th Cir. 2005). The citations of the two Decisions and Orders of the Board are at 341 N.L.R.B No. 35 (2004), and 341 N.L.R.B. No. 86 (2004).

## STATEMENT OF JURISDICTION

This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1) because the petition asks the Court to issue a writ of certiorari to review a case in the United States Court of Appeals for the Fifth Circuit. The Court of Appeals entered its opinion on February 16, 2005. This petition is being filed with the Clerk of this Court within 90 days from the date of the judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 158(a) (1) and (5) Unfair labor practices
a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title....

(5) to refuse to bargain collectively with the representatives of his employees....

## STATEMENT OF THE CASE

Petitioner, Superior Protection, Inc. ("Superior"), which provides security officers for federal office buildings, seeks review of a decision of the United States Court of Appeals for the Fifth Circuit enforcing a decision and order of the Board ordering Superior to bargain with the United Government Security Officers of America, Local 229 (the "Union").

In October, 2001, the Board held a representation election among a group of Superior Employees in a unit described as including of all its security officers assigned to work at GSA contract facilities in Harris, Montgomery, and Galveston Counties. Houston, Texas, is primarily in Harris County.

At the time the election was held, the General Services Administration (the "GSA") administered (that function is now under the authority of the Department of Homeland Security) two contracts in the Houston, Texas, metropolitan area, covering different federal office locations. Superior was the contractor for only one of the contracts; the one with a smaller number of security guards. The other contractor, for the second GSA contract, employed a significantly larger number of security guards, none of whom were represented by a labor union. The election was a tie, with one disputed challenged ballot, cast by an employee discharged before the election.

In May, 2002, Superior successfully bid on the second GSA contract in the Houston metropolitan area, and, as is customary, employed all of the security guards who

previously had worked for Superior's predecessor. **The Union, on January 13, 2003, filed a petition to represent the employees working under the contract newly acquired by Superior. Processing of this petition was deferred by the Regional Director and is still being held in abeyance by the Board. There is no indication that it will ever be processed.**

After prolonged litigation, on July 31, 2003, the Board ordered that the employee who cast the challenged ballot be reinstated with back pay, and that the challenged ballot be opened and counted. The Regional Director opened the challenged ballot, which was for the Union, giving the Union a bare majority, and certified the Union as the bargaining agent for all guards within the entire geographical unit (i.e., continuing with the same unit description despite the inclusion of the new group of guards working under the second contract).

Despite objections from Superior, the Board proceeded, on or about February 25, 2004, to ratify the certification of the Union as the exclusive bargaining representative for the described unit, without changing the description of the unit to exclude the majority of employees covered under the original description, who had not voted in the election. Under the Board certification, the employees working under **both** GSA contracts are now included in the bargaining unit as described above, since they **all** now work for Superior at GSA contract facilities in Harris, Montgomery, and Galveston counties. The Court of Appeals for the Fifth Circuit subsequently enforced that Decision and Order of the Board, on July 26, 2004.

Superior tested the certification by refusing to recognize or bargain with the Union, because (among other reasons not asserted here) recognizing the Union as the exclusive bargaining representative for the unit as described in the certification would have the effect of illegally accreting the larger number of employees in the recently acquired group working under the second GSA contract, into the smaller group of employees working under the first GSA contract who had voted for the Union by a one vote margin in the election. The certification of the unit as previously described had effected an accretion of a larger, unrepresented group of employees into a smaller group who alone had voted in the election, a clear violation of long-established law, cited in detail in the opinion of the Court of Appeals. See, *e.g., Renaissance Center Partnership*, 239 N.L.R.B. 1247 (1979).

In its decision ordering Superior to bargain with the Union, the Board stated that if there had been a merger of the two units of employees, the result could have been different. Superior, in a motion for reconsideration, notified the Board that in the interval between the Superior acquisition of the second contract with the larger number of guards, and the issuance of the Board's bargaining order, the employees working under the two contracts had, in fact, gradually become merged. The Board denied Superior's motion for reconsideration, stating that the merger information should have been presented to the Board earlier, although no investigation had been conducted by the Board.

The decision of the Court of Appeals which is the subject of this petition enforced the decision of the Board accreting the larger group into the smaller group.

## REASONS FOR GRANTING THE WRIT

The Fifth Circuit opinion in this case sanctions such a far departure by the Board from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Specifically, the reasoning of the Board, which was adopted by the Fifth Circuit, in certifying a unit of employees which clearly accretes the larger number of previously unrepresented security guards who did not have the opportunity to express their desires in a representation election into the smaller group which voted for the Union in an election, is specious, as is shown by the last paragraph of the Fifth Circuit opinion:

> ...Superior devotes considerable ink to a proposition that appears to present a nearly insurmountable obstacle to a [B]oard finding of accretion–namely, that the new security employees (of which there are 42) outnumber the existing unit employees (of which there are 29).(FN14) *See, e.g., Carr-Gottstein Foods Co.*, 307 N.L.R.B.1318(1992)('When the unrepresented group sought to be accreted numerically overshadows the existing unit, the [B]oard will not accrete the larger number of unrepresented employees without giving them a chance to express their representational desires'). In fact, in rejecting Superior's accretion argument, the Board recognized that 'accretion would be inappropriate if the employees at the additional facilities numerically overshadow the employees that existed at the time of the

> election.' Thus, should the union alter its current course and eventually seek to accrete the new employees to the existing unit, Superior can raise this numerical objection among others in that proceeding. 401 F.3d at p. 290.

The Fifth Circuit court justifies this position in reliance on a very dubious proposition:

> There is no basis in the record warranting the conclusion that the union is attempting to accrete the new employees at the additional facilities to the certified unit. To the contrary, as the Board observed, while the representation petition was pending before the Board, the union filed a separate representation petition seeking to be certified as the exclusive collective bargaining representative of the new employees at the additional facilities as a *separate* and *distinct* bargaining unit. In fact, the union's representation petition expressly classified the scope of the proposed unit as including "[a]ll sites *other* than locations in" the instant representation proceeding. (Emphasis added.)Because the union has not sought to accrete the new employees into the existing unit, Superior's reliance on *Renaissance Ctr. P'ship*, 239 N.L.R.B. 1247 (1979) is misplaced. 401 F.3d at p. 289.

As noted above, the Union petition to hold an

election among the new employees in the larger group, filed on January 13, 2003, **over two years ago**, has never been processed. In any event, now that the merger has occurred, there is no way to separate the employees in the once separate and distinct units. How will it be possible for the Union to represent only those employees who voted in the election, when they are integrated within the entire Houston region?

The Fifth Circuit has now issued a mandate enforcing a Board Decision and Order ordering Superior to bargain with the Union regarding a unit described as including all security guards under both contracts. If allowed to stand, the effect will be that the Union will be the exclusive bargaining representative of a group of employees, the majority of whom had no opportunity to express their desire to be so represented. This is a clear violation of our national labor policy and of the requirement of the National Labor Relations Act for majority determination of representation. There is no way, after the merger, to distinguish between the two groups of employees, who already had been, prior to the certification, transferred and inextricably intertwined among the various locations covered by the two GSA contracts now held by Superior. The certification is defective and Superior should not be required to bargain with a minority union. Accordingly, certiorari should be granted, and upon hearing, the decision of the Fifth Circuit should be reversed.

## CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

**NO. 04-60407**

**NATIONAL LABOR RELATIONS BOARD, Petitioner**

**verses**

**SUPERIOR PROTECTION, INC., Respondent**

**Petition for Enforcement of Order of**
**The National Labor Relations Board**
**Nos. 16-CA-21399, 21495, and 10361**

**Filed February 16, 2005**

Before DAVIS, SMITH, and

DENNIS, Circuit Judges

JERRY E. SMITH, Circuit Judge:

The National Labor Relations Board (the "Board") seeks enforcement of its order compelling respondent Superior Protection, Inc. ("Superior"), to bargain with United Government Security Officers of America, Local 229. Superior contends that enforcement should be denied on the sole ground that the collective bargaining unit certified by the Board improperly accreted (i.e., added) employees hired after the representation election into the certified bargaining unit without the benefit of an election, thus improperly assigning to the accreted employees the certified unit's choice of bargaining representative.

We disagree. The Board's bargaining unit determination did not automatically effect an accretion of newly-hired employees, and the union is not seeking to accrete those employees as a consequence of the unit determination. Accordingly, we grant the Board's application for enforcement.

Superior provides security services to federal agencies pursuant to contracts with the General Services Administration ("GSA"). One of these contracts obligates Superior to provide security officers to certain federal facilities in three Texas counties--Harris, Montgomery, and Galveston. In August 2001, the union filed a representation petition with the Board seeking certification as the collective-bargaining representative of security officers employed by Superior and "assigned to work in federally owned and leased property in Houston, Texas, including the

immediate surrounding areas, under the Federal Government contract for security services through the Employer (contractor)." Superior opposed the petition, contending that, although all security employees assigned to work at GSA facilities in Harris County[1] should be included, those in adjacent counties (Montgomery and Galveston) should be excluded from the certified unit.

After a hearing, the Board's Regional Director issued a decision finding that all security officers "assigned to work at GSA contract facilities in Harris, Montgomery, and Galveston counties" constituted the appropriate collective bargaining unit[2]. The Regional Director directed that an election be held among the employees in the unit. Superior requested Board review of the decision to include security officers from Montgomery and Galveston Counties, but the Board denied the request, finding that Superior had failed to raise any substantial issue warranting review.

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[1]The City of Houston is located primarily in Harris County.

[2] The Regional Director's unit determination provides:

> The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:
>
> *Included:* All permanent, full-time and regular part-time security officers assigned to work at GSA contract facilities in Harris, Montgomery and Galveston counties.
>
> *Excluded:* All office clerical employees, employees on temporary assignment, professional employees, managers and supervisors as defined by the Act.

A mail ballot election among unit employees was conducted by the Regional Director in October 2001. The secret ballots asked unit employees to vote up or down on whether they wished to be represented for purposes of collective bargaining by the union. Of the 30 unit employees then believed eligible to vote, 20 cast ballots, of which 9 voted in favor of representation by the union; 9 voted against; and 2 ballots were challenged and not counted.Superior and the union stipulated that one of the challenged ballots had indeed been cast by an ineligible voter. Thus, the single remaining challenged ballot, which had been cast by unit employee Kevin Trotter, was determinative. Superior maintained that Trotter was ineligible because he had been discharged before the election; the union countered by alleging that Superior had committed unfair labor practices by discharging Trotter for having testified at the representation hearing and for having engaged in union activity. Superior and the union litigated the validity of Trotter's challenged ballot and the related unfair labor practices complaint in a consolidated proceeding before an administrative law judge ("ALJ"). In August 2002, the ALJ sustained the union's unfair labor practices complaint, finding Superior's proffered reasons for discharging Trotter to be "pure subterfuge, masking the true motive of retaliation for Trotter's testimony at the Board proceeding and his manifest support" for the union. Thereafter, in a published decision issued in July 2003, the Board adopted the ALJ's unfair labor practices finding and directed the Regional Director to open and count Trotter's ballot, issue a revised tally of ballots, and provide the appropriate certification. *See* ***Superior Protection Inc.*, 339 N.L.R.B. 118, 2003 WL 21802944 (2003)**.Trotter's vote in favor of representation was added to a revised tally issued by

the Regional Director, yielding a 10 to 9 vote in favor of union representation. On August 25, 2003, the Regional Director certified the union as the exclusive collective-bargaining representative of employees in the previously certified bargaining unit: "[a]ll permanent, full-time and regular part-time security officers assigned to work at GSA contract facilities in Harris, Montgomery and Galveston counties."The union sought to bargain with Superior and requested information from Superior regarding unit employees. Superior refused to bargain and refused the union's request to provide information about unit employees.In response, the union filed an unfair labor practices complaint with the Board charging Superior with refusing to bargain and failing to furnish requested information in contravention of § 8(a)(1) and (5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(1), (5). The Board's General Counsel issued a complaint, and Superior filed an answer in which it admitted its refusal to bargain and to furnish requested information but challenged the union's certification as bargaining representative on grounds that (1) the certified bargaining unit inappropriately included employees in Montgomery and Galveston counties; and (2) Trotter was not an eligible voter, and thus the union had not received a majority of valid votes. In January 2004, the Board issued a notice to show cause why summary judgment should not be granted in favor of the General Counsel. Superior responded by restating its initial challenges--the certified bargaining unit was inappropriate, and Trotter was not eligible to vote in the election--and by advancing a challenge to the Regional Director's decision to direct a mail ballot election and to the manner in which the election was conducted. In addition, Superior averred for the first time that, even if the certified unit was appropriate as an

original matter, it was no longer appropriate because (after the Regional Director's initial unit determination) Superior had entered into a second contract with GSA to provide security officers at eight additional federal facilities within the geographic scope of the certified unit. According to Superior, the employees at these additional federal facilities within the geographic scope of the certified unit would effectively be accreted to the existing unit without an election, in violation of Board policy. In August 2004, the Board granted summary judgment in favor of the General Counsel, holding that Superior's admitted refusal to bargain and furnish requested information constituted unfair labor practices in violation of § 8(a)(1) and (5). *See* ***Superior Protection Inc.*, 341 N.L.R.B. 35, 2004 WL 378968 (2004)**. In so doing, the Board refused to reexamine Superior's arguments regarding the propriety of the three-county certified bargaining unit and Trotter's eligibility, reasoning that they had been fully litigated and addressed in the pre-election proceeding and the consolidated ballot challenge/unfair labor practices proceeding. The Board similarly rejected on procedural grounds Superior's challenge to the Regional Director's decision to conduct a mail ballot election and to the manner in which the election was conducted. As for Superior's claim that the certified unit was no longer appropriate because the employees at the eight additional GSA facilities it now services within the geographic scope of the certified unit would necessarily (and improperly) be accreted to the smaller group of employees in the certified unit, the Board rejected this claim on three grounds. First, the Board noted that there was no indication that the Union was seeking to accrete these new employees to the existing unit; indeed, the Board pointed to a separate representation petition filed by the Union in January 2003

seeking to represent the new employees at the additional GSA facilities as a separate and distinct bargaining unit. [3]

Second, the Board reasoned that the new employees would not automatically be accreted to the existing unit as a consequence of the Board's unit determination, especially in light of Superior's contention that the new employees outnumber the existing unit employees and of the Union's apparent position (gauged from the separate representation petition filed by the Union) that the new employees constitute a separate appropriate bargaining unit. Third, the Board observed that Superior was not claiming that the two groups of employees (old and new) had merged in a manner that had obscured their separate identity. Consequently, the Board entered an order compelling Superior to bargain with and furnish information to the Union. Superior filed a motion for reconsideration alleging that a "cursory inquiry" conducted by the company after the Board's decision revealed that the new employees at the additional GSA facilities had in fact merged or consolidated with the existing unit employees. The Board denied the motion, finding that Superior had not carried its burden of demonstrating that it had been diligent in discovering all available evidence and that the evidence was in fact previously unavailable. In May 2004, the Board filed the instant application for enforcement of its order compelling Superior to bargain with and furnish information to the Union.

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[3] This petition has been docketed and is referred to by the Board in its summary judgment decision as Case 16RC10480. The Board's summary judgment opinion reveals that the Regional Director took no action on this separate representation petition during the pendency of the instant representation petition, instead holding it in abeyance pending resolution of this matter.

II.

Having abandoned a majority of the arguments advanced to the Board, [4] Superior now attacks the Board's order on a single legal ground: It contends that, because the certified bargaining unit includes within its scope employees hired after the representation election to work at additional federal facilities, the Board improperly accreted these new employees to the certified unit without affording them an opportunity to manifest their will in a union election. Because the union has not *287 sought to accrete these employees, nor have the employees been automatically accreted to the existing unit as a consequence of the Board's unit determination, this contention is unavailing.

A.

We review questions of law decided by the Board *de novo*. "[I]f the Board's construction of the statute is 'reasonably defensible,' its orders are to be enforced." ***NLRB v. Motorola, Inc.*, 991 F.2d 278, 282 (5th Cir.1993)** (quoting ***Standard Fittings Co. v. NLRB*, 845 F.2d 1311, 1314 (5th Cir.1988)**).

B.

An accretion occurs when new employees, or present employees in new jobs, perceived to share a sufficient community of interest with existing unit employees, are

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[4] Because Superior's brief deals only with the alleged accretion, the company has abandoned its arguments related to the propriety of the original certified unit; Trotter's eligibility to vote in the union-shop election; the Regional Director's decision to direct a mail ballot election; and its challenge to the manner in which the mail ballot election was conducted.

added to an existing bargaining unit without being afforded an opportunity to vote in a union election.[5] The accretion doctrine thus assigns to the accreted employees the existing unit's choice of bargaining representative. *E.g.*, ***Baltimore Sun Co. v. NLRB*, 257 F.3d 419, 427 (4th Cir.2001)**. "Essentially, the doctrine is designed to preserve industrial stability by allowing adjustments in bargaining units to conform to new industrial conditions without requiring an adversary election every time new jobs are created or other alterations in industrial routine are made." ***NLRB v. Stevens Ford, Inc.*, 773 F.2d 468, 473 (2d Cir.1985)**.

Notwithstanding any benefits to industrial stability, because accreted employees are absorbed into an existing collective bargaining unit without an election and are governed by the preexisting unit's choice of bargaining representative, the accretion doctrine sits in substantial tension with the guarantee of employee self-determination reflected in § 7 of the NLRA, which provides: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to

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5 The most common circumstances giving rise to a claim of accretion involve an employer with a preexisting bargaining unit that acquires an additional facility where the new employees' interests align with existing unit employees, and the union attempts to add the new employees to the existing bargaining unit without an election. *See generally* Michael J. Frank, *Accretion Elections: Making Employee Choice Paramount*, 5 U. PA. J. LAB. & EMP. L. 101, 10708 (2002); 1 THE DEVELOPING LABOR LAW 404 (Patrick Hardin ed., 3d ed. 1992) ("An employer's acquisition or construction of an additional operation or facility after the execution of the contract frequently gives rise to a claim of accretion.").

refrain from any or all such activities.... 29 U.S.C. § 157.[6] Thus, although § 7 provides employees with the right to bargain collectively through "representatives of their own choosing" and "the right to refrain from" collective bargaining,[7] the accretion doctrine operates to contravene both of these rights--i.e., accreted employees are forced to accept both union representation itself and representation by a particular union without benefit of an election.

[3] Recognizing this conflict, the Board's jurisprudence "has historically favored employee elections, reserving accretion orders for those rare cases in which it could conclude with great certainty, based on the circumstances, that the employees' rights of self-determination would not be

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6 *See, e.g.*, *Pix Mfg. Co.*, 181 N.L.R.B. 88, 90, 1970 WL 25188 (1970) ("[W]hen a claim of accretion is made to an existing unit, a favorable determination forecloses a vote and restricts the employees in the exercise of their basic right to select their bargaining representative. That right is the predominant consideration under Section 7 of the Act and is to be restricted only under 'compelling conditions.' "); *Baltimore Sun*, 257 F.3d at 429 (noting that "misuse of accretion poses a significant threat to the self-determination rights of employees guaranteed by § 7 of the NLRA"); *NLRB v. Ill.-Am. Water Co.*, 933 F.2d 1368, 1377 (7th Cir.1991) ("[C]ourts exhibit heightened concern when applying the accretion doctrine because the accreted employees receive union representation without voicing their own choices through an election.") (citing *Consolidated Papers, Inc. v. NLRB*, 670 F.2d 754, 757 n. 4 (7th Cir.1982)); *id.* ("To a certain extent, an accretion interferes with the employees' 'freedom to choose their own bargaining agents.' ") (citing *Consolidated Papers*, 670 F.2d at 757 n. 4).

7 *See Baltimore Sun*, 257 F.3d at 426 ("This core provision guards with equal jealousy employees' selection of the union of their choosing and their decision not to be represented at all.") (citing *Newport News Shipbuilding & Dry Dock Co.*, 233 N.L.R.B. 1443, 1452, 1977 WL 9449 (1977)).

thwarted." ***Baltimore Sun*, 257 F.3d at 427**.[8] Accordingly, the Board will accrete employees to an existing unit without an election "only when the additional employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted." ***Safeway Stores, Inc.*, 256 N.L.R.B. 918, 1981 WL 20532 (1981)** (footnotes omitted).[9]

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8 *See also* ***Pan Am. Grain Co.*, 317 N.L.R.B. 442, 447, 1995 WL 301828 (1995)** (" 'In furtherance of the statutory duty to protect employees' right to select their bargaining representative, the Board follows a restrictive policy in finding accretion.' ") (quoting ***United Parcel Serv.*, 303 N.L.R.B. 326, 327, 1991 WL 146794 (1991)**); ***Boire v. Int'l Bhd. of Teamsters*, 479 F.2d 778, 795 (5th Cir.1973)** ("[T]he Board has traditionally been reluctant to find an accretion, even where the resulting unit would be appropriate, in those cases where a smaller unit, consisting solely of the accreted unit, would also be appropriate and the § 7 rights of the accreted employees would be better served by denying the accretion."); ***Stevens Ford*, 773 F.2d at 473** ("[B]ecause the accretion doctrine generally imposes a bargaining representative on employees without an election, it should be employed restrictively, with close cases being 'resolve[d] ... through the election process.' ") (quoting ***Westinghouse Elec. Corp. v. NLRB*, 440 F.2d 7, 11 (2d Cir.1971)**).

9 *See also* ***Baltimore Sun*, 257 F.3d at 428** ("When the two-part test of *Safeway Stores* is faithfully applied, accretion of employees to a bargaining unit will occur only in those extraordinary cases in which the Board can be reasonably certain that no election is required and that the accreted employees share such similar interests with employees in the bargaining unit that they would choose it."). This test is substantially more stringent than the traditional community of interest test applied in "the Board's more ordinary decision to certify initially a particular group of employees as an appropriate bargaining unit." ***NLRB v. DMR Corp.*, 795 F.2d 472, 475 (5th Cir.1986)**. In that context, "[t]he unit chosen need not be the most appropriate, but only one which is appropriate under the circumstances." ***Ochsner Clinic v. NLRB*, 474 F.2d 206, 209 (5th Cir.1973)**. In the accretion context, however, "[a] group of employees is

And, in furtherance of the NLRA's policy of employee self-determination, doubts as to whether new employees share the requisite overwhelming community of interest with the existing unit are to be resolved through the election process. [10] Moreover, the Board will not *289 permit an accretion if the size of the group to be accreted overshadows the number of employees in the existing unit.[11]

C.

There is no basis in the record warranting the conclusion that the union is attempting to accrete the new employees at the additional facilities to the certified unit. To the contrary, as the Board observed, while the representation petition was pending before the Board, the union filed a separate representation petition seeking to be certified as the exclusive collective bargaining representative of the new employees at the additional facilities as a *separate* and *distinct* bargaining unit. In fact, the union's representation petition expressly classified the scope of the proposed unit as including "[a]ll sites *other* than locations in" the instant representation proceeding. (Emphasis added.)Because the union has not sought to accrete the new employees into the existing unit, Superior's reliance on ***Renaissance Ctr. P'ship,***

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properly accreted to an existing bargaining unit when they have such a close community of interests with the existing unit that they have no true identity distinct from it." ***NLRB v. St. Regis Paper Co.***, 674 F.2d 104, 107-08 (1st Cir.1982).

[10] *See, e.g.*, ***Baltimore Sun***, 257 F.3d at 429; ***Westinghouse***, 440 F.2d at 11; ***Martin Marietta***, 270 N.L.R.B. 821, 822, 1984 WL 36443 (1984).

[11] *See, e.g.*, ***Gould, Inc.***, 263 N.L.R.B. 442, 445, 1982 WL 23866 (1982).

239 N.L.R.B. 1247, 1979 WL 8637 (1979), and evidence of an alleged merger between the two groups of employees is particularly misplaced. In *Renaissance,* the Board dismissed a union's clarification petition that sought to accrete a numerically larger group of new employees to an existing bargaining unit, even though the evidence revealed that the two groups of employees merged and had become indistinguishable. Here, however, the union is not seeking to clarify the confines of the existing unit by accreting new employees in light of evidence of employee merger or consolidation, but instead is seeking to treat the new employees as a separate bargaining unit. Moreover, we reject Superior's contention that the new employees at the additional GSA facilities will automatically be accreted to the existing unit as a consequence of the unit certified by the Board. Superior is no doubt correct that the certified unit includes on its face all security employees staffing GSA facilities in the three-county area.[12] But, contrary to Superior's assertions, this does not mean that the new employees at the additional facilities have been, or necessarily will be, accreted to the certified unit: "[T]he Board ... does not automatically accrete employees at a new [facility] solely because the unit description includes all the employer's [facilities], present and future, in a geographic area...." ***Coca-Cola Bottling Co.*, 310 N.L.R.B. 844, 844, 1993 WL 92246 (1993)**. Indeed, as the substantive law regarding accretion indicates, a finding of accretion is far from automatic: The Board will permit an accretion only in

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[12] As we have indicated, the certified bargaining unit includes "[a]ll permanent, full-time and regular part-time security officers assigned to work at GSA contract facilities in Harris, Montgomery and Galveston counties."

the small class of cases warranting a finding that the new employees cannot be considered a separate appropriate unit and that they share an overwhelming community of interest with the preexisting unit.

To be sure, this case does present some circumstances that would militate in favor of a finding of accretion by the Board--e.g., the fact the new employees were acquired after the unit determination but likely would have been included in the certified unit if they had been present earlier. [13] At the same time, however, Superior devotes considerable ink to a proposition that appears to present a nearly insurmountable obstacle to a board finding of accretion--namely, that the new security employees (of which there are 42) outnumber the existing unit employees (of which there are 29). [14] In fact, in

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[13] In this regard, consider, for example, the Board's explanation in *Pan American Grain* of when a finding of accretion would be justified:

> One aspect of this restrictive policy has been to permit accretion only in certain situations where new groups of employees have come into existence after a union's recognition or certification or during the term of a collective bargaining agreement. If the new employees have such common interests with members of an existing bargaining unit the new employees would, if present earlier, have been included in the unit or covered by the current contract, then the Board will permit accretion in furtherance of the statutory objective of promoting labor relations stability.

***Pan Am. Grain*, 317 N.L.R.B. at 447** (citing ***Gould*, 263 N.L.R.B. at 445**).

[14] *See, e.g.*, ***Carr-Gottstein Foods Co.*, 307 N.L.R.B. 1318, 1318, 1992 WL 175232 (1992)** ("When the unrepresented group sought to be accreted numerically overshadows the existing unit, the board will not accrete the larger number of unrepresented employees without giving them a chance to express their representational desires.").

rejecting Superior's accretion argument, the Board recognized that "accretion would be inappropriate if the employees at the additional facilities numerically overshadow the employees that existed at the time of the election." Thus, should the union alter its current course and eventually seek to accrete the new employees to the existing unit, Superior can raise this numerical objection among others in that proceeding.

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ENFORCEMENT GRANTED.C.A.5,2005.N.L.R.B. v. Superior Protection, Inc.401 F.3d 282, 176 L.R.R.M. (BNA) 2769, 150 Lab.Cas. P 10,449

**Superior Protection, Inc. *and* United Government Security Officers of America—Local 229. Case 16–CA–23210**
**April 23, 2004**

**Order Denying Motion**

By Members Liebman, Schaumber, and Walsh

The Respondent moves for reconsideration of our February 25, 2004 Decision and Order granting the General Counsel's Motion for Summary Judgment and requiring the Respondent to recognize and bargain with the Union as the representative of the unit certified in Case 16–RC–10361. See 341 NLRB No. 35. In its response to the General Counsel's Motion for Summary Judgment, the Respondent had contended, for the first time, that the certified unit is no longer appropriate because, in May 2002, after the election and consolidated unfair labor practice/challenged-ballot hearing had been held, the Respondent contracted with the General Services Administration (GSA) to provide security services at eight additional facilities within the geographic scope of the three-county unit. The Respondent asserted that the previously unrepresented employees at the eight new locations outnumbered the unit employees 42–29, and would effectively be accreted to the unit pursuant to the Board's bargaining order.

We rejected the Respondent's contention, noting, among other things, that the Respondent does not contend that the two groups of employees have been merged or consolidated, thereby completely obscuring their separate

identity. Cf. Renaissance Center Partnership, 239 NLRB 1247 (1979) (Board processed employer's RM petition, even though it was filed during the certification year, where the certified group of security personnel at the Renaissance Center had been consolidated and intermixed with a larger, unrepresented group of security personnel at a hotel within the same commercial development, the union had filed a unit-clarification petition seeking to accrete the larger group into the unit, and the evidence showed that the groups were now indistinguishable and that the only appropriate unit consisted of the overall security force).

The Respondent now moves for reconsideration, claiming that a "cursory inquiry" initiated after receipt of the Board's decision revealed that "at the present time," the two groups have, in fact, been "merged and consolidated." The Respondent asserts that the two groups are commonly supervised, perform identical duties, wear identical uniforms, enjoy identical terms of employment, permanently transfer between locations covered by the two GSA contracts, temporarily fill in for one another between locations covered by the first and second GSA contracts, and are otherwise indistinguishable, except that the first GSA contract requires the security officers to wear batons and the second does not. See affidavit of Reginald Jones (Exh. A). The General Counsel has filed an opposition, and the Respondent filed a reply thereto.

Having duly considered the matter, we deny the Respondent's motion for reconsideration. Section 102.48(d)(1) of the Board's Rules permits a party, because of "extraordinary circumstances," to move for reconsideration, rehearing, or reopening of the record after the Board's

decision or order. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

In order to establish that evidence is "newly discovered," the movant must show facts indicating that it "acted with reasonable diligence to uncover and introduce the evidence" and that it was therefore "excusably ignorant" of the evidence previously. *Fitel/Lucent Technologies*, 326 NLRB 46 fn. 1 (1998). Here, the Respondent generally asserts that it had unspecified conflicts that prevented adequate time for legal research and an investigation into the current status of the two groups of employees. The Respondent also notes that "motions for extension of time were filed and for the most part denied by the Board's Executive Secretary."

However, as noted by the General Counsel, the Respondent had approximately 3 months from the date of the charge, and 7 weeks from the date of the complaint, to research and investigate the unit issue, before its response to the General Counsel's Motion for Summary Judgment was due. Further, as indicated above, the Respondent implicitly acknowledges that a "cursory" investigation could have uncovered the evidence. Thus, we find that the Respondent has failed to carry its burden.

The Respondent has also not shown that the evidence was unavailable prior to the Board's February 25, 2004 Decision and Order. The Respondent states only that: (1) there had been "no significant merging" of the two groups at the time the Union filed a petition to represent the employees at the eight new facilities in January 2003 (see fn. 4, supra); (2) the merger of the two groups occurred "after" that petition was filed; and (3) the two groups are merged "at the present time." The Respondent, however, does not contend that the merger occurred after the Board's February 25 decision.

Finally, it is not clear that the new evidence would require a different result. In Renaissance Center Partnership, supra, the Board found that the two previously separate groups of security officers had become indistinguishable in part because the officers were now "randomly assigned to sections of the complex." 239 NLRB at 1247. Here, as indicated above, the Respondent con-tends only that employees "permanently transfer" and "temporarily fill in for one another" between locations under the first and second GSA contracts. This assertion itself indicates that employees are permanently assigned to a location rather than "randomly assigned." While it also indicates that there is permanent and temporary interchange between locations under the old and new GSA contracts, the Respondent does not reveal how often this occurs.

Accordingly, for all the foregoing reasons, the motion for reconsideration is denied.

Dated, Washington, D.C. April 23, 2004

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[1] The certified unit is:

INCLUDED: All permanent, full-time and regular part-time security officers assigned to work at GSA contract facilities in Harris, Montgomery and Galveston counties.

EXCLUDED: All office clerical employees, employees on temporary assignment, professional employees, managers and supervisors as defined by the Act.

[2] The General Counsel's Motion was filed on January 5, and the Notice to Show Cause issued on January 12. The Executive Secretary's Office granted Respondent a 1-week extension to file a response, to February 2. The Executive Secretary's Office denied the Respondent's second request for an extension of time.

[3] The Respondent also argues that it was the *Region's* responsibility to investigate the matter, pursuant to the new petition filed by the Union in January 2003. The Respondent asserts that the January 2003 petition sought to represent both groups of employees in the same unit. This assertion is incorrect and contrary to the Respondent's own prior response to the General Counsel's Motion for Summary Judgment. As Respondent stated in that response (p. 4), the January 2003 petition specifically states that it is seeking to represent the Respondent's employees in the Houston area at "all sites *other than* locations in 16-RC-10361. See Unit description, case pending before NLRB." Moreover, the Respondent acknowledges that "there was no significant merging" of the two groups of employees at the time the January 2003 petition was filed. Reply at 2. Thus, even if the Region had conducted an investigation at that time, it would not have uncovered the evidence.

[4] Member Schaumber finds it unnecessary to rely on the analysis set out in this paragraph and the accompanying footnote because he finds for the reasons set out above that the Respondent has not established that the evidence it seeks to adduce is newly discovered or has become available only after the Board's February 25, 2004 Decision and Order.

[5] Moreover, the Respondent may have had a bargaining obligation with respect to the permanent and/or temporary transfers (which it presumably would not have satisfied given its general refusal to recognize and bargain with the Union). See generally *J.W. Rex Co.*, 308 NLRB 473, 497–498 (1992), enfd. mem. 998 F.2d 1003 (3d Cir. 1993); *United Technologies Corp.*, 296 NLRB 571, 572 fn. 3 (1989); and *Kansas Education Assn.*, 275 NLRB 638, 639 (1985). If so, this would be an additional reason to find that the evidence of transfers is not a basis to revisit the certification. See *Telemundo de Puerto Rico, Inc. v. NLRB*, 113 F.3d 270, 155 LRRM 2338, 2345 (1st Cir. 1997) (evidence that employees had been recently assigned supervisory duties did not warrant revisiting certification since such changes were made unilaterally and violated the duty to bargain), and cases cited there. Compare *Frito-Lay, Inc.*, 177 NLRB 820 (1969) (Board vacated certification and dismissed 8(a)(5) complaint where employer had instituted nationwide organizational changes based on a management study begun prior to the representation proceeding, which changes eliminated the area managers' autonomy over day-to-day operations, the "essential factor" supporting the Board's finding that a unit limited to three of six districts was appropriate).

**Superior Protection Inc. and United Government Security Officers of America–Local 229.**
**Case 16–CA–23210**

**February 25, 2004**

## DECISION AND ORDER

By Members Liebman, Schaumber, and Walsh

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on November 5, 2003, the General Counsel issued the complaint on November 19, 2003, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain and to furnish information following the Union's certification in Case 16–RC–10361. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); Frontier Hotel, 265 NLRB 343 (1982).) The Respondent filed an answer, and a first amended answer, admitting in part and denying in part the allegations in the complaint.

On January 5, 2004, the General Counsel filed a Motion for Summary Judgment. On January 12, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On February 2, the Respondent filed a response, and on February 10, the General Counsel filed a reply thereto.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain and to furnish information, but contests the validity of the certification based on its contentions in the representation proceeding that: 1) the petitioned-for unit covering all of its security officers assigned to work at General Services Administration (GSA) contract facilities in three Texas counties is inappropriate, and the unit should be limited to security officers assigned to GSA contract facilities in Harris County (Houston and Pasadena); and 2) employee Kelvin Trotter is not an eligible voter because he was discharged prior to the election. In addition, the Respondent contends that the Regional Director improperly directed a mail ballot election, and that the Region failed to send mail ballots to eligible voters and to count mail ballots cast by eligible voters. Finally, the Respondent asserts that, in May 2002, after the representation case was litigated, it entered into a separate contract with GSA to provide guard services at eight additional facilities located within the geographic scope of the certified unit, and that the employees at these facilities would effectively be accreted to the unit pursuant to the Board's bargaining order in this case. The Respondent asserts that this raises a question regarding the appropriateness of the unit because the employees at these additional facilities, who were employed by the previous contractor, outnumber the unit employees at the facilities existing at the time of the election, 42 to 29, and it is well-established Board policy that a larger unit may not be accreted into a smaller unit without an election.

We find that the Respondent has not raised any representation issue warranting a hearing in this proceeding. The Respondent's contentions that the three-county unit is inappropriate and that Trotter is not an eligible voter were fully litigated and addressed by the Board in the preelection proceeding and the consolidated unfair labor practice/challenged ballot proceeding, respectively.[1] The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require us to reexamine the Board's findings on those issues.

With respect to Respondent's contention that the Regional Director improperly directed a mail-ballot election, the Respondent never requested the Board in the representation proceeding to review the Regional Director's decision to conduct the election by mail. Although the Respondent mentioned in its request for review of the Regional Director's Decision and Direction of Election that it opposed the decision to hold a mail ballot election, it did so only in support of its contention that the petitioned-for three-county unit is inappropriate; that is, the Respondent claimed that the Regional Director's analysis on the mail ballot issue supported the Respondent's position on the scope-of-unit issue. The Respondent did not request the Board to overturn the Regional Director's direction of a mail ballot election. The Respondent, therefore, is precluded under Section 102.67(f) of the Board's Rules from raising the issue in this proceeding. See Ritz-Carlton Hotel Co., 321 NLRB 659 fn. 1 (1996), enfd. 123 F.3d 760 (3d Cir. 1997).

For similar reasons, the Respondent is also precluded

from raising an issue in this proceeding about the manner in which the Region conducted the mail ballot election. Although the Respondent raised this issue in the consolidated unfair labor practice/challenged ballot proceeding, it failed to do so in timely filed objections as required by Section 102.69 of the Board's Rules. The administrative law judge, therefore, refused to allow the Respondent to litigate the issue, since it was not relevant to Trotter's eligibility, the only issue that the Respondent did timely raise. See 339 NLRB No. 118, slip op. at 3 fn. 2 (2003). The Board affirmed the judge's ruling and the Respondent does not offer to produce any newly discovered and previously unavailable evidence or allege that there are special circumstances that would require us to reconsider that ruling in this proceeding. See Sundor Brands, Inc., 325 NLRB 499 (1998); Bishop Mugavero Center for Geriatric Care, 323 NLRB 642 (1997) (employer's failure to file timely objections to the conduct of the election precludes it from raising the issue in the subsequent refusal-to-bargain proceeding absent newly discovered and previously unavailable evidence).

Finally, we also find that no issue warranting a hearing is raised by the Respondent's contention that the certified unit is no longer appropriate because the employees at the eight additional GSA facilities it now services within the geographic scope of the unit would necessarily be accreted to the smaller group of employees who work at the GSA facilities it serviced at the time of the election. As an initial matter, there is no indication that the Union is seeking to accrete the employees at the additional facilities into the unit. On the contrary, as the Employer acknowledges, the Union filed a petition on January 13, 2003 (Case 16-RC-10480), seeking to represent the employees at those

facilities in a separate unit.

Further, contrary to the Respondent's contention, the employees at the additional facilities would not necessarily be accreted into the unit pursuant to the Board's bargaining order. Although the unit description on its face includes all security officers assigned to GSA contract facilities located in the three-county area, "the Board does not automatically accrete employees at a new [facility] solely because the unit description includes all the employer's [facilities], present and future, in a geographic area." Coca-Cola Bottling Co. of Wisconsin, 310 NLRB 844 (1993). As the Respondent itself argues, accretion would be inappropriate if the employees at the additional facilities numerically overshadow the employees at the facilities that existed at the time of the election. See, e.g., Gould, Inc., 263 NLRB 442, 445 (1982). Accretion would also be improper if, as the Union appears to assert in its January 13, 2003 petition in Case 16–RC–10480, the employees at the additional facilities would constitute a separate appropriate unit. See, e.g., Ready Mix USA, Inc., 340 NLRB No. 107, slip op. at 8–9 (2003); Passavant Retirement & Health Center, 313 NLRB 1216, 1218 (1994); and Houston Division, 219 NLRB 388 (1975). The Respondent does not address this unit question.

Finally, the Respondent does not contend that the two groups of employees have been merged or consolidated, thereby completely obscuring their separate identity. Cf. *Renaissance Center Partnership*, 239 NLRB 1247 (1979) (Board processed employer's RM petition, even though it was filed during the certification year, where the certified group of security personnel at the Renaissance Center had been consolidated and intermixed with a larger, unrepresented group of security personnel at a hotel within

the same commercial development, the Union had filed a unit-clarification petition seeking to accrete the larger group into the unit, and the evidence showed that the groups were now indistinguishable and that the only appropriate unit consisted of the overall security force).

Accordingly, we find that the Respondent has not raised any representation issue or special circumstances that are properly litigable in this unfair labor practice proceeding or that warrant reconsideration of the certification. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); *Action Automotive, Inc.*, 284 NLRB 251, 255–256 (1987), enfd. 853 F.2d 433 (6th Cir. 1988), cert. denied 488 U.S. 1041 (1989).

We also find that there are no genuine issues of material fact warranting a hearing regarding the Union's request for information. The complaint alleges, and the Respondent's answer admits, that the Union requested the following information from the Respondent by letter dated September 30, 2003:

1. A list of all posts and assignments in the unit and their Federal jurisdiction (i.e. partial, proprietary, concurrent, or exclusive), and the number of productive hours performed at each assignment.

2. The current list of names, addresses, and phone numbers for all employees in Houston.

As indicated above, the Respondent also admits that it refused to provide the foregoing information. Although the Respondent denies that the requested information is necessary for, and relevant to, the Union's performance of its

duties as the exclusive collective-bargaining representative of the unit employees, the Respondent does so based solely on its contention that the Union was not properly certified.

Moreover, it is well established that information concerning unit employees' names, addresses, phone numbers, work assignments, and hours is presumptively relevant for purposes of collective bargaining and must be furnished on request. Here, although the Union's request for the names, addresses, and phone numbers of all employees in Houston is not expressly limited to unit employees in Houston, the context suggests that the Union is only seeking information concerning unit employees. In any event, to the extent the Union's information request could be construed as requesting nonunit information, this would not excuse the Respondent's blanket refusal to comply with the request. It is well established that an employer may not simply refuse to comply with an ambiguous or overbroad information request, but must request clarification or comply with the request to the extent it encompasses necessary and relevant information.

Accordingly, we grant the Motion for Summary Judgment and will order the Respondent to bargain with the Union and to furnish the Union with the information it requested relating to unit employees.

On the entire record, the Board makes the following Findings of Fact:

i. jurisdiction

At all material times, the Respondent, a Delaware corporation with an office and place of business in Houston, Texas, has been engaged in the business of providing

security services for federal agencies.

During the 12-month period preceding issuance of the complaint, the Respondent provided services valued in excess of $50,000 directly to customers located outside the State of Texas.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

ii. alleged unfair labor practices

A. The Certification

Following the mail ballot election conducted October 15 through 29, 2001, the Union was certified on August 25, 2003, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

INCLUDED: All permanent, full-time and regular part-time security officers assigned to work at GSA contract facilities in Harris, Montgomery and Galveston counties.

EXCLUDED: All office clerical employees, employees on temporary assignment, professional employees, managers and supervisors as defined by the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

About September 30, 2003, the Union, by letter, requested the Respondent to bargain and to furnish necessary and relevant information, and, since about the same date, the

Respondent has failed and refused to do so. We find that the Respondent's conduct constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

Conclusion of Law

By failing and refusing on and after September 30, 2003, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit and to furnish the Union necessary and relevant information, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement. We shall also order the Respondent to furnish the Union the information it requested relating to unit employees.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964),

enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Superior Protection Inc., Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Government Security Officers of America–Local 229, as the exclusive bargaining representative of the employees in the bargaining unit, and refusing to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

INCLUDED: All permanent, full-time and regular part-time security officers assigned to work at GSA contract facilities in Harris, Montgomery and Galveston counties.

EXCLUDED: All office clerical employees, employees on temporary assignment, professional employees, managers and supervisors as defined by the Act.

(b) Furnish the Union the information it requested on September 30, 2003, relating to unit employees.

(c) Within 14 days after service by the Region, post at its facility in Houston, Texas, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 30, 2003.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 25, 2004

No. 05-123

IN THE

SUPREME COURT OF THE UNITED STATES

SUPERIOR PROTECTION, INC.,
Petitioner,

v.

N.L.R.B.
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

# SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI


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## QUESTIONS PRESENTED FOR REVIEW

1.

Whether the certification by the National Labor Relations Board (the "Board") of a collective bargaining unit of security guards employed by a GSA contractor almost two years following a representation election was an illegal accretion in violation of the National Labor Relations Act, 29. U.S.C. Section 151, *et. seq.* (the "Act"). In this case, a majority of the guards included within the description of the certified unit did not become employed until after the election, when the employer acquired additional locations by successfully bidding on another GSA contract, following which the employees working under both contracts were merged into a single unit.

## STATEMENT OF INTERESTED PARTIES

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit were:

Superior Protection, Inc. - Petitioner
Michael Jay Kuper - Counsel for Petitioner
Raymond L. Kalmans - Counsel for Petitioner
National Labor Relations Board - Respondent
David Seid - Counsel for Respondent
Aileen Armstrong - Counsel for Respondent
Meredith Jason - Counsel for Respondent
Curtis Wells - N.L.R.B. District 16 - Regional Director
James Carney - USGOA Local 1225 President

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## TABLE OF CITED AUTHORITIES

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29 U.S.C. § 158(a) (1), (3) and (4).....1

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is at 401 F.3d 282 (5th Cir. 2005). The citations of the two Decisions and Orders of the Board are at 341 N.L.R.B No. 35 (2004), and 341 N.L.R.B. No. 86 (2004).

## STATEMENT OF JURISDICTION

This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1) because the petition asks the Court to issue a writ of certiorari to review a case in the United States Court of Appeals for the Fifth Circuit. The Court of Appeals entered its opinion on February 16, 2005. This petition is being filed with the Clerk of this Court within 90 days from the date of the judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 158(a) (1) and (5) Unfair labor practices
a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title....

(5) to refuse to bargain collectively with the representatives of his employees....

## SUPPLEMENTAL STATEMENT

Superior Protection, Inc. (Superior), Petitioner, files this supplemental brief, pursuant to Rule 15, calling the Court's attention to a new case, *Nott Company, Equipment Division*, 345 NLRB No. 23 (2005) (*Nott*).

## THE FACTS

*Nott* was decided by the National Labor Relations Board (the "Board") on August 27, 2005. The fact situation in *Nott* is strikingly similar to that in this case. In Nott, however, unlike in the instant case, the Board correctly interpreted and applied the rules of merger, integration, and accretion. In *Nott*, the Board held that an employer (the "Employer") could withdraw recognition from a union during the term of a collective bargaining agreement (the "CBA") because the Employer had acquired another company with an equal amount of employees, who were unrepresented, and who were later merged with the original unit of employees represented by the union.

The facts in *Nott*, briefly, are as follows:

The Employer was engaged in the distribution and repair of forklifts. The Employer had a forty year collective bargaining relationship with International Union of Operating Engineers, Local 49 (the "Union), and there was a collective bargaining agreement (the "CBA") in effect with a term of four years, from August 1, 1996, through July 31, 2000. On July 16, 1998, the Employer lost its Hyster Forklift franchise, and on October 1, 1998, the Employer purchased the assets of Metro, a Nissan Forklift franchisee. On October 2, 1998, the fourteen Metro employees doing the same work as the employees in the bargaining unit covered by the CBA became employed by the Employer. At that time the Employer had fourteen employees in the bargaining unit. Shortly, even though this was not the original plan prior to the acquisition, the two groups of employees were merged and consolidated. The Employer thereupon withdrew recognition from the union and refused to continue to honor

the CBA. The union filed refusal to bargain charges against the Employer. The Board found no violation, because:

> ....there is an integration of functions and work forces, but because the unrepresented and represented groups of employees are equal in number, there can be no accretion. Where there is an integration, but no accretion, an employer is not obligated to continue to bargain with the union, even as to an existing group of employees. **Thus...we find that the [Employer] did not violate the Act when it withdrew recognition from the Union. Id. at p. 6..... Finally, although industrial stability is an important policy goal, it can be trumped by the statutory policy of**

> **employee free choice. That policy is expressly in the Act, and indeed lies at the heart of the Act. In the circumstances of this case, we adhere to that policy. *Id.* at p. 9.** (emphasis added).

On May 31, 2005, Superior filed RM and UC petitions with the Board Regional office seeking an election among the employees in the merged unit to determine whether the Union represented a majority of them, since the Regional Office had failed to process the prior representation petition filed by the Union. In a June 21, 2005, letter, the Board's Regional Director formally blocked processing of the petitions filed by Superior, giving as a reason Superior's refusal to bargain with the Union. The Regional Director acknowledged that Superior had refused to bargain with the Union as the representative of the merged unit on the grounds that a majority of the employees in the merged unit

were employed by acquisition, and were unrepresented. No collective bargaining agreement is or has been in effect.

*Nott* is a correct interpretation and application by the Board of the principles and law of merger, integration, and accretion. The Board in *Nott* went so far as to permit the employer to withdraw recognition during the term of the CBA. In this case, the Board has not interpreted or applied those principles or law correctly. The reason given by the Board's Regional Director is circular and revealing: **the Board has been attempting to force Superior to recognize the Union as the exclusive bargaining representative of the merged and integrated group of employees, a majority of whom have never been represented and have never even had the opportunity to vote in an election. Superior will not voluntarily comply, because recognizing the Union would constitute an illegal accretion. The Board's Regional Director asserts that Superior's refusal to bargain with the Union without an election is an unfair**

**labor practice, and utilizes it as a pretext for blocking the Union's and Superior's petitions for an election to determine the wishes of the employees in the merged and integrated unit, a majority of whom were employed after the election as the result of an acquisition.** In this case, unlike in *Nott*, the Union has never been recognized, and there is no CBA in effect. Superior should not be ordered to bargain unless and until an election is held, and a majority of the unit employees vote for the Union.

The petition for writ of certiorari should be granted.

## CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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June 21, 2005

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RE: Superior Protection, Inc.
Cases 16-RC-10480, 16-RM-768,
and 16-UC-212

Dear Gentlemen:

Because of the related unresolved unfair labor practices and Respondent's continued refusal to bargain with United Security Officers of America Local 229, I am blocking further processing of the petitions filed in Case Nos. 16-RM 768 and 16-UC-212 pending the outcome of the aforementioned action. Further, as Case No. 16-RC-10480 is also related to the unfair labor practices and the recently filed petitions, that petition will also remain blocked until the resolution of the related unfair labor practices.

On January 28, 2003, the petition filed in Case 16-RC-10361 was placed in abeyance pending the Board's decision involving the consolidated unfair labor practice complaint and post-election determinative challenge ballot. On July 31, 2003, the Board in ***Superior Protection, Inc.***, 339 NLRB 954 (2003), directed the Regional Director to open and count the challenged ballot of Kelvin Trotter.

The Regional Director issued a revised tally of ballots showing a majority of the votes cast were for representation by the United Security Officers of America Local 229. On August 25, 2003, the Union was certified as the exclusive collective bargaining representative of the bargaining unit. Thereafter, the Union requested bargaining and sought information from the Employer who refused the Union's requests in order to test

the certification. The Union filed an unfair labor practice charge in Case 16-CA-23210 that resulted in the issuance of a complaint. In January 2004, the Board issued a notice to show cause why summary judgment in favor of the General Counsel was inappropriate.

On February 25, 2004, the Board in ***Superior Protection, Inc.***, 341 NLRB No. 35 (2004), granted summary judgment in favor of the General Counsel and entered an order compelling Superior Protection, Inc. to bargain with and furnish information to the Union.

Superior requested reconsideration by the Board on March 5, 2004, alleging that the Board's order created a forced accretion as the acquisition of other contracts to provide security services within the geographic scope of the three-county unit resulted in the addition of a greater number of unrepresented employees to the certified unit. The Employer argued that this merger of a greater number of unrepresented employees with a lesser number of represented employees resulted in an accretion issue. This was the first occasion that the Employer claimed that the two groups of employees had been merged or consolidated, thereby obscuring their separate identity.

On April 23, 2004, the Board in ***Superior Protection, Inc.***, 341 NLRB No. 86 (2004), denied the Employer's motion for reconsideration reasoning that Superior failed to establish that the evidence adduced for reconsideration was newly-discovered and noted that the evidence presented was inconclusive as to whether a different result was required.

On May 10, 2004, the Board petitioned the United States Fifth Circuit Court of Appeals for enforcement of the Board order compelling Superior to bargain with and furnish information to the Union.

On February 16, 2005, the Court found in ***N.L.R.B. v. Superior Protection, Inc.***, 401 F.3d 282 (2005), that Superior had abandoned all its previous arguments to the Board with the exception of the argument that the Board improperly allowed an automatic accretion of the new employees at the eight additional facilities with the certified unit. The Court acknowledged that the certified unit included on its face all security employees in the three-county area. However, the court rejected Superior's argument and noted that the Union had not sought to accrete the new employees into the existing unit, and "[the] Board does not automatically accrete employees at a new [facility] solely because the unit description includes all Superior's [facilities], present and future, in a geographic area." ***Id., citing Coca-Cola Bottling Co.***, 310 NLRB 844 (1993).

The Court granted enforcement of the Board's order and Superior has failed to comply.

On May 24, 2005, Superior filed a motion with the Circuit Court to recall the Court's mandate. Superior also filed a writ of certiorari with the United States Supreme Court.

On May 31, 2005, the Employer filed petitions in Case Nos. 16-RM-768 and 16-UC-212 seeking an election among a unit of guards, including unrepresented guards and/or to clarify the existing unit as a result of changed circumstances namely, the acquisition of additional guard employees at other locations within the geographic scope of the certified unit.

Considering the related unresolved unfair labor practices and Respondent's continued refusal to bargain with United Security Officers of America Local 229, I am blocking further processing of the petitions filed in Case Nos. 16-RM 768 and 16-UC-212 pending the outcome of the aforementioned action. As Case No. 16-RC-10480 is also related to the unfair labor practices and the recently filed petitions, that petition will also remain blocked until the resolution of the related unfair labor practices.

Sincerely,

Curtis A. Wells

Curtis A. Wells
Regional Director

345 NLRB No. 23, 2005 WL 2115868 (N.L.R.B.)

**(Cite as: 2005 WL 2115868 (N.L.R.B.))**

C

NATIONAL LABOR RELATIONS BOARD
(N.L.R.B.)

*1 NOTT COMPANY, EQUIPMENT DIVISION
AND
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 49
Case 18-CA-15056
August 27, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

Upon a charge filed on November 13, 1998, against Nott Company, Equipment Division (Respondent), the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on August 6, 1999. The complaint alleges that the Respondent violated Section 8(a)(1) by prohibiting union discussion among employees during worktime. The complaint also alleges that the Respondent violated Section 8(a)(5) and (1) by: failing and refusing both to comply with the collective-bargaining agreement and to recognize and bargain with the Union; withdrawing recognition from the Union and repudiating the collective-bargaining agreement; prohibiting union business agents from gaining access to the Respondent's facility or speaking to employees during worktime; and announcing employee restrictions on talking.

On March 17, 2000, the Respondent, the Charging Party, and the General Counsel jointly filed a Stipulation of Fact, with attached exhibits, and a request that the case be transferred to the Board for its consideration. The parties stipulated that the charge, the complaint and notice of hearing, and the answer, together with the Stipulation and referenced exhibits, constitute the entire record in this proceeding, and that no oral testimony is necessary or desired by any party. The parties further stipulated that they waived a hearing before an administrative law judge, the making of findings of fact and conclusions of law by an administrative law judge, and the issuance of a decision by an administrative law judge, and that they desired to submit this case directly to the Board for findings of fact, conclusions of law, and the issuance of a decision and order by the Board.

On June 30, 2000, the Board issued an order approving the Stipulation and transferring the proceeding to the Board. Thereafter, the parties executed a Supplemental Stipulation of Fact (answering certain questions raised by the Board's Order) and filed briefs.

On the basis of the record and the briefs, the National Labor Relations Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Minnesota corporation, with an office and place of business in Bloomington, Minnesota, has been engaged in the distribution and repair of forklifts. During the calendar year ending December 31, 1998, the Respondent, in conducting its business operations, purchased and received, at its Bloomington, Minnesota facility goods valued in excess of $50,000 directly from points located outside the State of Minnesota. At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. At all material times, the Charging Party (or Union) has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Facts

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***2** The Respondent is engaged in the sale, rental and service of forklifts, and was, until recently, the exclusive Minnesota franchise dealer for Hyster Forklift products. The Respondent and the Union have had a 40-year collective-bargaining relationship. The most recent contract between the parties was effective from August 1, 1996 through July 31, 2000.

The bargaining unit consists of employees, including field and shop mechanics, employed by the Respondent at its Bloomington facility and at other permanent shops and field-mechanic resident locations in Minnesota. [FN1] On April 1, 1998, [FN2] the Union represented, in a single unit, the Respondent's 27 shop and field service mechanics employed at four locations (Bloomington, Duluth, Hibbing and St. Cloud).

On July 16, the Respondent lost the Hyster franchise. On October 1, the Respondent purchased the assets of Metro Forklifts (Metro) in Maple Grove, Minnesota. Metro owned the Nissan Forklift franchise. At the time of this asset purchase, the Respondent's work force had declined to 14 employees. Metro also employed 14 shop and field service employees, who were unrepresented. Historically, Metro's employees performed the same type of work as the Respondent's unit employees. At the time of the acquisition, the Respondent intended to continue operating the Maple Grove facility as a separate facility of Nott Company.

On October 2, the 14 Metro employees became the Respondent's employees. On October 5, two of the four former Metro shop mechanics were transferred from Maple Grove to Bloomington. On or about October 12, Metro's dispatch operation (which is nonunit work) was transferred from Maple Grove to Bloomington. After October 12, all field mechanics, who work in the field and report to the Respondent's facilities only to obtain parts or for administrative reasons, [FN3] were dispatched from the Bloomington facility, regardless of whether they were employed out of Bloomington or Maple Grove. On October 26, the remaining two former Metro shop mechanics were transferred to Bloomington. On November 2, the Respondent closed the Maple Grove facility and consolidated the entire operation at Bloomington.

At no time since November 2 has the Union demonstrated majority support among the employees in the consolidated unit. In November, the Respondent withdrew recognition from the Union as representative for its employees in the unit and has failed and refused to honor the contract with the Union.

On November 13, two union business representatives attempted to enter the Bloomington facility to distribute copies of the union contract to the former Metro employees. The Respondent's division manager denied them access, but accepted the copies to forward to the shop steward. Subsequently, the Respondent's service manager met with the business representatives, and, citing the Respondent's no-solicitation policy, told them that they would not be permitted to enter the facility and meet with employees during worktime. Later that day, the Respondent's managers met with the union steward, gave him the copies of the contract, and told him not to engage in union discussions with either set of employees (preexisting Nott or former Metro employees) during worktime. They further told him that the former Metro employees were from a purchased company and had nothing to do with the Union. Prior to this, the Respondent had allowed the Union reasonable access to its facilities and employees, and had allowed employees to discuss the Union during worktime. The Union was not advised of these changes prior to November 13. These deviations from past practice constitute unilateral changes in terms and conditions of employment, and would be unlawful if the Union was the lawful representative of unit employees on November 13.

B. Issue

***3** The parties stipulated that the issue is:

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whether Respondent's withdrawal of recognition of the Union is permissible because the Union lost majority status once the former Metro employees were employed at the Bloomington location.
The General Counsel and the Charging Party acknowledge that, if the Respondent's withdrawal of recognition did not violate the Act, then the unilateral changes that occurred on November 13 were not unlawful because the Union no longer had 9(a) status. Moreover, if the Respondent's withdrawal of recognition was not unlawful, the General Counsel and the Charging Party do not request a remedy for the 8(a)(1) violation alleged in complaint paragraph 5. [FN4]

C. The Parties' Arguments

1. General Counsel and Charging Party

The General Counsel and the Charging Party argue that contract-bar and "expansion of unit" principles govern this case. They argue that Board precedent establishes the principle that, if previously represented employees constitute a substantial percentage of the unit following a consolidation with unrepresented employees, and if there is otherwise a substantial continuity in the operations, a collective-bargaining agreement must remain in effect, at least when no other union has advanced a claim to represent the employees at the facility. [FN5] They further argue that the requisite factors exist in this case. [FN6] It follows that, because the contract operates as a bar, the Respondent violated Section 8(a)(5) by repudiating the contract and withdrawing recognition. Citing Marine Optical, Inc., 255 NLRB 1241 (1981), enfd. 671 F.2d 11 (1st Cir. 1982), the General Counsel and the Charging Party argue that finding otherwise allows an employer to do unilaterally that which the employees in the bargaining unit (through a decertification petition) or a rival union (through a certification petition) cannot do. As a matter of policy, they argue that applying contract-bar principles promotes industrial stability while ensuring employee free choice at reasonable intervals.

According to the General Counsel and the Charging Party, the Respondent attempts to capitalize on the fact that its work force was temporarily low, and that the acquisition of a new franchise required an infusion of new employees. They argue that, because this was a purchase of assets, the Respondent was not required to hire any Metro employees. They further argue that, if the Respondent had hired previously unrepresented employees off the street, there would be no question that both the bargaining relationship and the contract would continue in full force and effect, even if the newly hired, previously unrepresented employees outnumbered the incumbent, represented bargaining unit employees. In their view, these newly hired Nott Company employees are indistinguishable from other new hires that are presumed to support the Union in the same proportion as existing employees. [FN7]
*4 As a factual matter, the General Counsel and the Charging Party emphasize both what this case is--and what, in their view, it is not. It is, they say, an employer changing franchises during a contract term and afterwards operating in the same location with the same number of employees performing the same tasks they had always performed. It is not an employer purchasing a competitor to expand its operations, or a union attempting to apply the contract to an employer's new facility or operation. Thus, this case involves an employer's purchase of assets to restore its historical business and the restoration of a bargaining unit to traditional levels.

As a legal and/or policy matter, the General Counsel and the Charging Party emphasize that the Board places a high value on stability in bargaining relationships, especially during the life of a contract. This is evidenced, they argue, by the fact that the Board has required continued recognition of a union in certain situations even where majority status has been lost. They cite certain "relocation" cases where the Board has held that an employer who relocates and transfers the entire bargaining unit must still

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recognize the union and apply the existing contract if the transferees from the closed facility constitute at least 40 percent of the new facility's employee complement. [FN8] They also cite a "subcontracting" case where the Board, without making a specific finding of majority status, held that an employer, who had subcontracted and resumed bargaining unit operations within the same contract term, was bound to recognize and bargain with the union as to newly hired employees. [FN9]

The General Counsel and the Charging Party argue that the precedent cited by the Respondent is inapposite. They note that in Geo. V. Hamilton, Inc., 289 NLRB 1335 (1988), and Central Soya Co., 281 NLRB 1308 (1986), affd. 867 F.2d 1245 (10th Cir. 1988), an accretion analysis was applied after the employer purchased an ongoing entity and transferred employees and operations to the purchased entity's location. They argue that the "defining distinction" between those cases and this one is that, here, there has been no change in the Respondent's operations and no continuity of the purchased entity's (Metro's) operations. They also argue that Renaissance Center Partnership, 239 NLRB 1247 (1979), is distinguishable because there a contract had not been executed (thus contract-bar principles were not implicated), and also because the operations had been expanded. Finally, they argue that J.R. Simplot Co., 311 NLRB 572 (1993), enfd. 33 F.3d 58 (9th Cir. 1994), cert. denied 513 U.S. 1147 (1995), contrary to the Respondent's view, supports their argument that majority status is not necessary to require continued recognition. [FN10]

***5** With respect to the alleged 8(a)(1) violations, the General Counsel and the Charging Party argue that an employer violates the Act by unilaterally imposing restrictions on a union's access to the employer's facility and employees during worktime. [FN11] They also argue that an employer violates the Act when, contrary to past practice, it unilaterally prohibits a union steward or other employee from discussing the union with other employees during worktime. [FN12] They conclude that the Respondent here, having done both, violated Section 8(a)(1).

2. Respondent

The Respondent argues that accretion and majority status principles govern this case. Specifically, the Respondent argues that accretion principles apply when there is a consolidation of operations and a transfer of employees between one historically represented unit and one historically nonrepresented unit. The Respondent further argues that where the union, as here, does not have a clear majority, a valid accretion cannot occur, and an employer is no longer obligated to continue to recognize and bargain with the union.

The Respondent maintains that the following three cases establish the governing legal principles: (1) Central Soya Co., above, where the unrepresented group of employees sought to be accreted was smaller than the represented existing group, (2) Geo. V. Hamilton, Inc., above, where the unrepresented and represented groups of employees were equal in number, and (3) Renaissance Center Partnership, above, where the unrepresented group outnumbered the represented group. In Central Soya, the Board accreted the unrepresented group into the larger represented group, and held that the employer was obligated to continue to deal with the union. Conversely, in both Geo. V. Hamilton and Renaissance Center, the Board refused to find an accretion and to extend the bargaining obligation. The Respondent argues that this trilogy of cases stands for the proposition that there cannot be a valid accretion where the group of employees sought to be accreted is equal or larger in number than the number of represented employees in the existing bargaining unit.

The Respondent also argues that contract-bar principles and accretion principles serve different ends. According to the Respondent, contract-bar rules do not apply here because this is not a dispute

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between competing unions seeking the right to represent the unit and because there is no representation petition. Thus, the Respondent argues, General Extrusion Co., 121 NLRB 1165 (1958), and Bowman Dairy Co., 123 NLRB 707 (1959), are distinguishable on their facts. Even assuming similar facts, the Respondent contends that General Extrusion carved out an exception to the general contract-bar rule; namely, a contract is not a bar where the contract is executed prior to a substantial increase in personnel or if major changes occurred in the operation. Finally, the Respondent argues that Harte and Co., 278 NLRB 947 (1986), is distinguishable because it is a relocation case.

D. Analysis and Conclusions

***6** Having carefully considered the record, we conclude that an accretion analysis is appropriate. That is, the issue is whether a new group of employees is to be added to an extant unit without any consideration of the desires of those new employees. As discussed infra, we would not do so in this case. Further, in view of this conclusion, and in light of the fact that the previously represented employees are no longer a majority in the new overall unit, we conclude that there is no bargaining obligation in that unit.

We recognize that, in some accretion cases, a party seeks to add a new group of employees to an extant unit of union-represented employees. In such cases, there is no question as to the union's representation of the previously extant unit. There is only a question as to the new employees. By contrast, in the instant case, the Respondent challenges the majority status of the entire unit. However, the Board applies the accretion analysis in that situation as well. [FN13] For example, in Renaissance Center, unrepresented employees of one employer were added to the represented employees of another employer. The Board found no accretion, and ordered an election among all of the employees.

Applying accretion principles to the instant facts, we conclude, as discussed below, that the Respondent did not violate Section 8(a)(5) when it withdrew recognition from the Union. This is because, as the parties stipulated, the Union lost majority status once the former Metro employees were employed at the Bloomington location. It follows, as the General Counsel and the Charging Party acknowledge, that the unilateral changes that occurred on November 13 were not unlawful because the Union no longer had Section 9(a) status.

An accretion analysis is ordinarily applied in situations involving consolidation of a represented group with an unrepresented group. Special Machine & Engineering, 282 NLRB 1410 (1987); J.R. Simplot Co., 311 NLRB 572, 58?, fn. 83 (1993), enfd. 33 F.3d 58 (9th Cir. 1994), cert. denied 513 U.S. 1147 (1995) (where there is "merger" of employee complements from two former plants, accretion principles apply, "requiring a 'majority' analysis, rather than a 'substantial percentage' analysis"). Here, there can be no doubt that the new employees (former Metro employees) share common interests with members of the existing bargaining unit. The parties stipulated that they do exactly the same work at the same locations. It is equally clear (and also stipulated) that this case involves the consolidation of a represented group with an unrepresented group. Thus, this case must be considered within an accretion framework.

The Board has followed a restrictive policy in regard to accretion because it forecloses the employees' basic right to select their bargaining representative. Towne Ford Sales, 270 NLRB 311 (1984), affd. 759 F.2d 1477 (9th Cir. 1985). The Board has stated that it will not, "under the guise of accretion, compel a group of employees ... to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret election...." Melbet Jewelry Co., Inc. (Retail Clerks, Local 212), 180 NLRB 107, 110 (1969). Recent cases continue to adhere to this restrictive approach

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to accretions. Gulf Caribe Maritime, Inc., 330 NLRB 766 (2000); ATS Acquisition Corp., 321 NLRB 712, 713 fn. 6 (1996), enfd. 127 F.3d 1105 (9th Cir. 1997); Compact Video Services, 284 NLRB 117, 119 (1987).

***7** Under that restrictive policy, there is no accretion under the instant facts. This is because the unrepresented group sought to be accreted is equal in number to the existing represented group (14 former Metro employees versus 14 existing Nott employees). As correctly noted by the Respondent, the Board has refused to "accrete" a larger or equal number of employees into a smaller certified unit when the case involves a group of preexisting employees with a separate history of representation or nonrepresentation. Geo. V. Hamilton, Inc., above; Renaissance Center Partnership, above; Massachusetts Electric Co., 248 NLRB 155, 157 fn. 8 (1980). Those cases govern the instant case, where there is an equal number of represented and unrepresented employees with separate representational histories.

Geo. V. Hamilton, Inc., 289 NLRB 1335 (1988), is similar to this case. In Geo. V. Hamilton, the union represented Hamilton's two warehouse employees. One worked in the Hamilton warehouse; the other worked in a nearby commercial warehouse where Hamilton rented space. Hamilton formed CMD, Inc. (found by the Board to be a single employer with Hamilton), which bought the commercial warehouse and hired the two employees working there (making a total of three at this warehouse). Hamilton continued renting space at the CMD warehouse, and the one Hamilton and two CMD employees began working together at the CMD warehouse without regard to space boundaries. Hamilton later laid off the Hamilton employee working in the CMD warehouse. The union filed a grievance arguing that the two CMD warehouse employees should be considered part of the warehouse bargaining unit (and covered by the contract), and thus laid off ahead of the Hamilton employee who held greater seniority. The complaint alleged, in pertinent part, that the respondent had refused to recognize and bargain with the union as the exclusive representative of the warehouse employees at both locations, and had further refused to apply the terms of the contract to the CMD employees.

The Board held that the respondent neither unlawfully refused to recognize and bargain with the union, nor unlawfully refused to apply the contract to a unit of warehouse employees covering both facilities. Citing Central Soya Co., 281 NLRB 1308 (1986), the Board reasoned that the two-employee unrepresented CMD group did not constitute an accretion to the previously represented two-employee Hamilton group. The Board noted the full operational integration of the warehouse operations, but found that the "crucial factor" in finding an accretion in Central Soya--union majority status--was not present. In so finding, the Board stated: "to find an accretion, even when the two groups in question are of approximately equal size, there must be a showing ... that the employees in the represented group outnumber the employees in the unrepresented group." The Board then expressly overruled Public Service Co. of New Hampshire, 190 NLRB 350 (1971), discussed in Central Soya, which had allowed an accretion of a group of unrepresented employees to a group, equal in number, of represented employees.

***8** Because, in Geo. V. Hamilton, there could be no accretion, the Board further held that the respondent was not obligated to bargain with the union or to apply the contract terms to a combined unit of warehouse employees. Moreover, the respondent was no longer obligated to bargain with the union regarding the Hamilton employees. Citing Abbott-Northwestern Hospital, 274 NLRB 1063 (1985), and Renaissance Center Partnership, above, the Board found that a unit of only Hamilton employees ceased to be an appropriate unit when the Hamilton and CMD warehouse functions became integrated; that, after the integration, the only appropriate unit was an overall unit comprised of all warehouse employees;

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that a question of representation existed in the overall unit; and that, accordingly, the Respondent was no longer obligated to bargain with the union about the Hamilton employees. In sum, the Board held that an employer is not obligated to continue to recognize and bargain with a union as the exclusive bargaining representative of one group of employees when that represented group is merged with an unrepresented group in such a manner that an accretion cannot be found and the original represented group is no longer identifiable.

Here, as in Geo. V. Hamilton, there is an integration of functions and work forces, but because the unrepresented and represented groups of employees are equal in number, there can be no accretion. Where there is an integration, but no accretion, an employer is not obligated to continue to bargain with the union, even as to an existing group of employees. Thus, consistent with Geo. V. Hamilton and Abbott-Northwestern Hospital, we find that the Respondent did not violate the Act when it withdrew recognition from the Union.

As discussed above, we have relied on three cases to support our position. Our dissenting colleague says that there are "flaws" in those precedents, and these "flaws ... have found a home in the majority opinion." In response, we note at the outset that the three cases represent Board law that goes as far back as 26 years. And, the one case that was judicially tested was affirmed. No party seeks the reversal of this precedent. In all of these circumstances, we would not reach out to reverse the precedent sua sponte.

In addition, the precedent is sound. There is a distinction between the instant case and (1) cases involving a mere relocation, [FN14] (2) cases involving a turnover of employees, [FN15] and (3) cases involving a temporary shutdown and then reopening at the same location. [FN16] In the relocation situation, the old facility (unionized) is "simply removed to a new site." [FN17] In the turnover situation, there has been normal turnover, and the Board is not willing to presume that the new employees are opposed to union representation. In the last situation, there has only been a temporary hiatus in operations. By contrast, the instant case involves the entrepreneurial decision to buy a company, retain the employees, and consolidate them at the prior location. [FN18] In such circumstances, the unit itself has undergone a substantial change. And, in such circumstances, the numbers cannot be ignored. Absent a General Counsel showing that the union represented a majority in that unit, there is no obligation to recognize that union. Nor does the existence of the contract require a different result. As noted, the unit itself has changed. Although a contract will bar a question concerning representation (qcr) in the same unit, it will not bar a qcr in a different unit.

***9** Finally, although industrial stability is an important policy goal, it can be trumped by the statutory policy of employee free choice. That policy is expressly in the Act, and indeed lies at the heart of the Act. In the circumstances of this case, we adhere to that policy.

Our dissenting colleague says that the Board applies "different rules ... depending on what [a] transaction is called." We believe that there are real distinctions between different transactions, and these differences call for different results. The law is often called upon to articulate real distinctions requiring different results. Thus, where a unit of employees is simply moved from one location to another, there may be no reason to question the majority status of the union. Similarly, where there is ordinary turnover of employees, at a given location, there are policy reasons for not permitting that fact to give rise to a question concerning representation. But where a new group of unrepresented employees is added wholesale to an extant unit (e.g., through a purchase of a business), and that new group is equal to or outnumber the extant group, there is a real basis for raising a question as to whether the union is the majority choice in the new unit.

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Many of the cases cited by the General Counsel and/or the Charging Party in support of their contract-bar theory involve facts markedly different from those presented here. Contrary to their suggestion, this case does not involve a mere expansion or enlargement of existing operations requiring the hiring of new employees. Rather, it involves the addition of a new group with a history of separateness. See Meyer's Café & Konditorei, 282 NLRB 1 fn. 1 (1986). Moreover, the core issue in General Extrusion Co., 121 NLRB 1165 (1958), was whether a substantial and representative employee complement had been reached at the time the contract had been executed. That case effectively codified, in an expanding unit situation, the minimum sized work force and number of job classifications which must exist at the time a contract is signed before that contract can bar a petition. That issue is not presented by this case.

The other cases relied upon by the General Counsel and the Charging Party are also inapposite. In ABF Freight System, Inc., 325 NLRB 546 (1998), the Board distinguished General Extrusion, above, Kroger Co., 155 NLRB 546 (1965), and Martin Marietta Co., 270 NLRB 821 (1984), on the basis that they involved competing interests between two unions. Bowman Dairy Co., 123 NLRB 707 (1959), likewise involved a conflict between two bargaining representatives. Public Service Co. of New Hampshire, 190 NLRB 350 (1971), one of the few cases following Bowman since it issued in 1959, has been overruled. [FN19] Harte & Co., 278 NLRB 947 (1986), involved a relocation situation, another factual scenario not presented here.

***10** In sum, this case requires that a balance be struck between the implicit statutory policy of stability in bargaining relationships and the express Section 7 rights of employees both to choose their own bargaining representative or to refrain from collective bargaining altogether. Indeed, in refusing to accrete a numerically larger group into an existing certified unit, the Board has expressed caution precisely "because it would deprive the larger group of employees of their statutory right to select their own bargaining representative," a right which the Board characterized as a "fundamental precept of the Act," not to be improperly discounted. Renaissance Center Partnership, 239 NLRB at 1247-1248. Similarly, where, as here, the number of new, previously unrepresented employees equals the number of existing bargaining unit employees, the balance tilts in favor of the employees' express statutory right of free choice.

Accordingly, given the instant facts and the Board's restrictive approach to accretions, there can be no accretion here, and no attendant duty to bargain. Because the Respondent has not violated the Act by withdrawing recognition under the circumstances presented here (and because of the parties' stipulations regarding the other complaint allegations if the Respondent were not found to have unlawfully withdrawn recognition), the complaint is dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent's withdrawal of recognition from the Charging Party and repudiation of the collective-bargaining agreement did not violate Section 8(a)(5) and (1) of the Act.

4. The Respondent has not otherwise violated the Act.

On these findings of fact and conclusions of law, and on the entire record, the Board issues the following

ORDER

The complaint is dismissed.

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345 NLRB No. 23, 2005 WL 2115868 (N.L.R.B.)

**(Cite as: 2005 WL 2115868 (N.L.R.B.))**

Dated, Washington, D.C. August 27, 2005

Robert J. Battista

Chairman

Peter C. Schaumber

Member

FN1. The parties stipulated that the appropriate bargaining unit is:

All full-time and regular part-time employees, including working foreman, field journeymen, shop journeymen, equipment delivery employees, service trainees, periodic maintenance/tire press persons and mechanic helpers, employed by Respondent at 171 West 79th Street, Minneapolis, Minnesota, and other permanent shops and field mechanic resident locations in the State of Minnesota; excluding office clerical employees, guards and supervisors as defined in the Act.

The parties further stipulated that the unit address of "171 W. 79th Street, Minneapolis" is the "Bloomington facility" referred to herein.

FN2. All dates are in 1998 unless noted.

FN3. Field mechanics needing parts for Hyster forklifts obtained them from Bloomington. Similarly, field mechanics needing parts for Nissan forklifts obtained them from Maple Grove.

FN4. Par. 5 alleges that the Respondent violated the Act on November 13 by interfering with, restraining, and coercing an employee in the exercise of his Sec. 7 rights by prohibiting union discussions among employees during worktime.

FN5. In support of this principle, the General Counsel and the Charging Party cite General Extrusion Co., 121 NLRB 1165 (1958), and Bowman Dairy Co., 123 NLRB 707 (1959). In General Extrusion, the Board held that a merger of operations which does not result in the creation of a new operation, major personnel changes, or a change in the character of the jobs, will not remove a contract as a bar. The contract is a bar if, at the time the contract was signed, the regular employee complement in the bargaining unit was at least 30 percent of the regular employee complement at the time of the hearing on an election petition, and at least 50 percent of the job classifications in existence at the time of the hearing were in existence when the contract was signed. In Bowman Dairy, the employer purchased another dairy business whose 31 employees, formerly Teamsters-represented, were consolidated with the employer's preacquisition work force of 26 Dairy Workers-represented employees. The Board found that the Dairy Workers contract covered both sets of employees under the 30/50 percent General Extrusion rule.

FN6. Here, after the acquisition of Metro's assets, the union-represented employees constituted at least 30 percent of the new employee complement, and the Respondent's job classifications and operations remained virtually unchanged.

FN7. See NLRB v. Hondo Drilling Co., N.S.L., 525 F.2d 864 (5th Cir. 1976), cert. denied 429 U.S. 987 (1976); John S. Swift Co., 133 NLRB 185 (1961), enfd. 302 F.2d 342 (7th Cir. 1962).

FN8. See Harte & Co., 278 NLRB 947 (1986); Rock Bottom Stores, Inc., 312 NRLB 400 (1993), enfd. 51 F.3d 366 (2d Cir. 1995); Westwood Import Co., 251 NLRB 1213 (1980), enfd. 681 F.2d 664 (9th Cir. 1982).

FN9. F & A Food Sales, Inc., 325 NLRB 513 (1998), enfd. 202 F.3d 1258 (10th Cir. 2000).

FN10. The Stipulation states: "At no time since the date of the transfer of Metro employees...has the Union demonstrated majority support among the employees in the consolidated unit." The General Counsel's brief states its "position that...the Union

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never enjoyed majority status among Respondent's employees since the final transfer of the former Metro employees. .." Despite this, the Union asserts that the Board could find that the Union maintained majority status because the Metro employees were transferred in three phases to Nott's Bloomington facility during October. The Union argues that, to the extent that the former Metro employees had any separate identity from the Nott employees, that identity was destroyed as each group was transferred. Thus, majority status was at all times maintained because, at the time each group was transferred, there were more employees in the existing bargaining unit than those being transferred on that date. It is well established, however, that the General Counsel's theory of the case is controlling, and that a charging party cannot enlarge upon or change the General Counsel's theory. Zurn/N.E.P.C.O., 329 NLRB 484 (1999), citing Kimtruss Corp., 305 NLRB 710 (1991). Accordingly, we do not pass on the validity of the Charging Party's theory.

FN11. See Control Services, 303 NLRB 481, 486 (1991), enfd. 961 F.2d 1568 and 975 F.2d 1551 (3d Cir. 1992); Associated Services for the Blind, 299 NLRB 1150, 1168 (1990); Torrington Extend-A-Care Employees Assn. v. NLRB, 17 F.3d 580, 595 (2d Cir. 1994).

FN12. See Timken Co., 331 NLRB 744 (2000); General Fabrications Corp., 328 NLRB 1114 (1999), enfd. 222 F.3d 218 (6th Cir. 2000); Hausner Hard-Chrome of KY, Inc., 326 NLRB 426 (1998).

FN13. Geo. V. Hamilton, Inc., 289 NLRB 1335 (1988); Renaissance Center Partnership, 239 NLRB 1247 (1979); Central Soya Co., 281 NLRB 1308 (1986), affd. 867 F.2d 1245 (10th Cir. 1988).

FN14. Harte & Co., 278 NLRB 947 (1986).

FN15. Cutten Supermarket, 220 NLRB 507 (1975).

FN16. El Torito-La Fiesta Restaurants, 295 NLRB 493 (1989), enfd. 929 F.2d 490 (9th Cir. 1991).

FN17. Harte & Co., above, at 948.

FN18. The case therefore involves more than the movement of employees. Thus, contrary to our dissenting colleague, the case does not turn on the direction of a move, i.e., whether employees go from place A to place B or vice-versa.

FN19. In fact, in Public Service Co. of New Hampshire, above at 351, Chairman Miller, stated in a strong dissent:

> The Bowman case does not seem to me to have given proper recognition to the interests of the added employees, and its holding has not been followed in subsequent cases, at least where the added employees have been represented by another labor organization.... Nor do I believe it should be followed where the moved employees are at least as numerous as the employees they join, and have in the past been unrepresented. (Emphasis added).

*11 MEMBER LIEBMAN, dissenting.

Inevitably perhaps, over the course of nearly 70 years, the Board's decisions have sometimes collided with each other. Layer upon layer of doctrines interpreting the Act have evolved, with inconsistencies sometimes emerging and often unexplained. There is likely no area of the law more snarled than that defining an employer's continuing duty to maintain an established bargaining relationship after some business transaction occurs. Different rules may be applied depending on what the transaction is called, with distinctions supported by little real analysis. Given our volatile business climate, the opportunities for clashing doctrines are rife. Compounding the difficulty is the underlying statutory tension between the Act's basic purpose of stabilizing labor relations (as announced by the 1935 enactment) and its sometimes competing purpose of preserving employee free choice (as announced by

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the 1947 Taft-Hartley amendments). This case puts the confusion in bold relief.

The employer here withdrew recognition of the union at midterm of their agreement, claiming that the union did not retain the support of a majority of unit employees, after a newly-hired group of formerly unrepresented workers joined the bargaining unit. The majority validates that withdrawal of recognition, describing the transaction as a "consolidation" (and not, for example, an "expansion" of existing operations or a "relocation") and invoking the Act's protection of employee free choice. But it never seriously seeks to reconcile competing doctrines or explains why it ignores well-established principles, under which unions enjoy a conclusive presumption of majority support during the term of a collective-bargaining agreement, a doctrine designed to balance the competing statutory policies.

Rather, the majority perpetuates an aberration in Board precedent: that an employer may--under the guise of a "consolidation" of employees, which affects neither the bargaining unit's work nor the employer's business operation-- abrogate its collective-bargaining agreement and strip its employees of the union representation they have freely chosen by statutory right. Extolling the virtues of employee free choice, the majority advances employer free choice, permitting the Respondent unilaterally to withdraw recognition even without an election. [FN1] Had the case turned on what actually happened with this work force, and not on pigeonholing the transaction, the outcome would be otherwise. The decision would preserve workplace stability without sacrificing employee free choice.

## I. THE CONCLUSIVE PRESUMPTION OF MAJORITY STATUS AND THE CONTRACT-BAR DOCTRINE

The legal principles that properly should control this case are well established. In Auciello Iron Works, Inc. v. NLRB, 517 U.S. 781 (1996), a unanimous Supreme Court endorsed the Board's policy affording unions a conclusive presumption of majority status during the term of a collective-bargaining agreement. Id. at 785-786. As the Court explained, the presumption is not based on any certainty that the union's numerical majority support among unit employees will continue during the contract term. Instead, it is grounded in the policy goal of stabilizing collective-bargaining relationships. During the term of the agreement, the conclusive presumption precludes an employer's withdrawal of recognition or other challenge to the union's majority status--even in the face of evidence showing a loss of actual, numerical majority support--with limited exceptions for unusual circumstances. Id. at 786 fn. 3.

***12** The conclusive-presumption principle is based on the Board's contract-bar doctrine. See id. at 786. The essence of that doctrine is that absent exceptional circumstances, "the Board will not entertain a representation petition seeking a new determination of the employees' bargaining representative during the middle period of a valid outstanding collective-bargaining agreement of reasonable duration." Hexton Furniture Co., 111 NLRB 342, 344 (1955). Rather, unit employees may exercise their Section 7 right to choose or reject union representation at predictable intervals between contracts. Free choice is thus not denied, but merely delayed. The doctrine's purpose is to achieve "a finer balance between the oftentimes conflicting policy considerations of fostering stability in labor relations while assuring conditions conducive to the exercise of free choice by employees." Deluxe Metal Furniture Co., 121 NLRB 995, 997 (1958).

The contract-bar doctrine was specifically designed for the representation-election context. However, the Board drew on the principles embodied in the doctrine when it considered analogous unfair labor practice cases, especially withdrawals of recognition at midterm of an agreement. [FN2] In either context, the status of the collective-bargaining representative during the contract term was potentially at issue, and

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thus consistency of legal principles was required. [FN3]

There are exceptions to the contract-bar rule for significantly unusual, "changed circumstances" during the contract term. General Extrusion Co., 121 NLRB 1165, 1167 (1958). For example, a current contract will not bar consideration of a bargaining representative's status when there has been either a dramatic increase in personnel and job classifications, or a massive change in the nature of the employer's business such that it can be viewed as a completely different operation. [FN4] But significantly for this case, "a mere relocation of operations accompanied by a transfer of a considerable proportion of the employees to another plant, without an accompanying change in the character of the jobs and the functions of the employees in the contract unit, does not remove a contract as a bar." Id. at 1167-1168.

II. THE APPROPRIATE ANALYSIS

Applying these principles to the facts here should be a straightforward matter.

A. Factual Background

The Respondent sells, rents, and services forklifts. It has had a collective-bargaining relationship with the Union for 40 years. Their most recent collective-bargaining agreement dated from August 1, 1996 until July 31, 2000. The contractual bargaining unit consists of the Respondent's forklift mechanics.

*13 In October 1998, after several months of business difficulties, the Respondent bought the assets of Metro Forklifts, a nonunion business whose mechanics performed exactly the same work as the Respondent's unit employees. After hiring 14 of the Metro mechanics, on November 2, 1998, the Respondent brought them together with its own 14 mechanics to work as one group based in the Respondent's Bloomfield, Minnesota location. The Respondent's business operation remained exactly the same as it was prior to the Metro purchase. Its mechanics--both the former Metro employees and the original Nott unit employees--continued to do exactly the same service and repair work they had performed prior to November 2. In effect, it is undisputed that nothing changed except for the addition of 14 employees performing bargaining unit work. Later in November, the Respondent repudiated its contract with the Union and withdrew recognition, claiming that, because of the addition of the Metro mechanics, the Union no longer represented a majority of the bargaining unit employees.

B. Application of Contract-Bar Principles

As a matter of law, the Union was entitled to a conclusive presumption of majority status through the term of its contract with the Respondent. Under the applicable contract-bar principles, the increase in the size of the bargaining unit was not substantial enough to create an exception to the conclusive presumption. The original Nott employees represented by the Union constituted 50 percent of the overall unit once the Metro employees were added. In addition, there was absolutely no change in the nature of the Respondent's operation or in the functions of the employees in the overall unit. Thus, there were no "changed circumstances" that would negate the conclusive presumption.

Accordingly, following the broad current of Supreme Court and Board precedent, I would find that the Respondent's withdrawal of recognition violated Section 8(a)(5) and (1). As my colleagues acknowledge, the other unfair labor practices alleged in the complaint are established if this violation is found. Therefore, I would find that Respondent violated Section 8(a)(5) and (1) as further alleged in the complaint.

III. THE MAJORITY'S ANALYSIS

The majority's analysis relies on a trio of Board decisions that themselves were questionably reasoned, and its explanation for failing to apply

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contract-bar principles, contradicting 50 years of precedent, is itself dubious. The majority does not explain, and cannot explain, why the result here should be different than in a wide range of analogous situations addressed by the Board in the past. Its attempt to invoke a policy rationale, finally, is at odds with the Act itself and with a bedrock principle acknowledged by the Supreme Court: employers are not permitted to decide for employees whether or not they will be represented by a union.

A. The Majority's Application of Precedent

My colleagues find that because the Respondent "consolidated," or "integrated," an equal number of union and unrepresented employees in one group, the Metro mechanics could not be accreted into the bargaining unit, the Union automatically lost its majority status, and the Respondent's withdrawal of recognition did not violate the Act.

*14 To be sure, there is some Board precedent in support of the majority's determination. The majority relies principally on three Board decisions in reaching its result: Renaissance Center Partnership, 239 NLRB 1247 (1979); Central Soya Co., 281 NLRB 1308 (1986), affd. 867 F.2d 1245 (10th Cir. 1988); and Geo. V. Hamilton, Inc., 289 NLRB 1335 (1988).

In Renaissance Center, a representation case, the Board found that a question concerning representation existed after the employer combined its 59 bargaining-unit guards working in the employer's office/retail complex with 67 unrepresented guards who worked in a hotel that was part of the complex. The employer's guard unit had recently been certified by the Board, raising the question of whether a new election should be barred under the certification-bar doctrine. The Board defined the combination of represented and unrepresented employee groups as a "consolidation." 239 NLRB at 1247. It then declined to find that the unrepresented hotel guards were an accretion to the bargaining unit, because they out-numbered the guards already in the unit. The Board also rejected the claim that the certification-bar doctrine precluded an election, finding instead an "unusual circumstance": "[t]he consolidation of the two groups has precipitously increased the size of the employer's security force and has completely obscured the separate identity of the certified bargaining unit. . ." Id. at 1248. The Board concluded that the certified unit was therefore no longer appropriate, and ordered an election in the combined unit.

Renaissance Center involved the certification-bar doctrine rather than, as in the present case, an extant collective-bargaining agreement implicating contract-bar principles. The Board thus did not confront a contract-bar situation. (Arguably, there is an even greater need for stability once a contract is negotiated.) To the extent that the certification-bar doctrine is analogous to contract-bar principles, [FN5] Renaissance Center represents dubious precedent on its own terms. It is clearly inconsistent with the expanding-unit rules and other principles set forth in General Extrusion, above. [FN6] Thus, Renaissance provides a shaky precedent, at best, for the decisions that follow it

In Central Soya, above, the Board found that the employer's withdrawal of recognition from the union violated Section 8(a)(5). During the term of its collective-bargaining agreement with the union, the employer transferred 17 bargaining-unit employees to a new location and combined them there with 13 unrepresented employees. The respondent then withdrew recognition. Identifying the transaction as a "consolidation as well as a relocation," 281 NLRB at 1309, the Board found that the 13 unrepresented employees were accreted into the existing unit. The Board relied on the preexisting unit employees' numerical majority (distinguishing Renaissance Center) and on the fact that the employer's business operation remained substantially the same after the "relocation/consolidation." 281 NLRB at 1309. In these circumstances, the Board found that the union retained its majority status, and that the employer was

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therefore obligated to apply the contract to the combined employee group.

***15** The Central Soya Board relied on the faulty "numerical-majority" analysis in Renaissance Center for guidance, although it distinguished the facts. Further, Central Soya implied--without any explanation--that the conclusive presumption of majority status was inapplicable because the case involved a "consolidation." Thus, the Board found distinguishable, without further comment, "exclusively relocation cases": Westwood Import Co., 251 NLRB 1213 (1980), and Harte & Co., 278 NLRB 947 (1986). 281 NLRB at 1309 fn. 6. Westwood and Harte had both applied the Board's conclusive presumption and contract-bar principles in light of existing collective-bargaining agreements. Central Soya therefore created a special category for "consolidation" cases without explaining how they differ analytically from relocation cases, [FN7] and without explaining why contract-bar and conclusive presumption theories do not apply.

In Geo. V. Hamilton, above, the employer combined two unrepresented warehouse employees with two warehouse employees covered by a collective-bargaining agreement. It then refused to bargain concerning the two new employees and withdrew recognition from the union regarding the two employees previously in the contractual unit. The Board dismissed the Section 8(a)(5) complaint. It characterized, without explanation, the combination of the employee groups as an "operational integration" and indicated that this was equivalent to the undefined "consolidation" in Central Soya. 289 NLRB at 1338. The Board also agreed that, like Central Soya, the integration resulted in no substantial change in the respondent's warehouse operation. However, it distinguished Central Soya on the "crucial factor" of numerical majority: unlike the previous case, the warehouse employees in the respondent's contractual unit did not represent a majority of the combined employee group, and therefore the two unrepresented employees could not be accreted into the unit. Id. at 1338-1339. In addition, the Board, citing Renaissance Center, indicated that an "unusual circumstance" existed: the integration of the two unrepresented employees with the two union employees caused the contractual unit to become inappropriate. Therefore, according to the Board, the respondent's withdrawal of recognition was justified. 289 NLRB at 1340.

***16** As should be evident, Hamilton is built on the errors in the precedent it follows. The Hamilton Board relied on the improper "consolidation category" created in Central Soya to insulate its analysis from contract-bar and conclusive-presumption principles. And it drew support from Renaissance Center for the erroneous proposition that a mingling, or "integration," of union and unrepresented employees, in and of itself, "obscures" an existing bargaining unit, permitting a withdrawal of recognition during the contract term. Most significant, the Board drew its conclusions in the face of its own finding that there was no substantial change following the integration: all of the employees in the combined group continued to do the same work within the same business operation--a critical factor in relocation cases (see fn. 8 above). [FN8]

All of the flaws in Renaissance Center, Central Soya, and Hamilton have found a home in the majority opinion. My colleagues identify the November 2 transaction combining 14 unrepresented and 14 union mechanics as both a "consolidation" and an "integration." Having thus placed the circumstances in Central Soya's questionable "consolidation category," they follow Hamilton in finding that the original Nott bargaining-unit employees ceased to be a numerical majority in the combined group, and therefore an accretion of the Metro employees could not take place. [FN9] Notwithstanding their denial of an accretion, they find that an "integration" of the Metro employees with the Nott employees did occur. Accordingly, under Renaissance the contractual unit ceased to exist, and under Hamilton the Respondent was free to abrogate the existing collective-bargaining

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agreement and terminate its bargaining relationship with the Union. At the same time, however, they acknowledge that after November 2, there was no change in the nature of the work the combined group performed, and no change in the nature of the Respondent's business.

B. The Majority's Failure to Apply Contract-Bar Principles

Distinct from the Board's approach in Central Soya and Hamilton, the majority at least addresses contract-bar principles in its analysis. However, my colleagues say that these principles are inapplicable essentially because this is an unfair labor practice proceeding. In their view the contract-bar doctrine is limited to representation proceedings.

*17 Their explanation is simply wrong. The Board has been applying contract-bar principles in unfair labor practice cases for more than 50 years, particularly in situations where the employer has withdrawn recognition at midterm of an agreement. See, e.g., Sanson Hosiery Mills, Inc., 92 NLRB 1102 (1950), enfd. 195 F.2d 350 (5th Cir. 1952), cert. denied 344 U.S. 863 (1952). [FN10]

C. Board Precedent in Analogous Circumstances, and the Majority's Policy Rationale Here

The result reached here cannot be reconciled with Board precedent in analogous circumstances. The majority has concluded that because this case involves an "integration" of an equal number of union and nonunion employees at an existing facility, the Respondent's withdrawal of recognition did not violate the Act. However, if the same basic factual pattern (i.e., the combined group of employees performing exactly the same work as before, with the nature of the company's operation unchanged) were presented in a variety of alternative contexts, the result would be starkly different under Board precedent.

The conclusive presumption of majority support and the contract-bar doctrine would apply:

(1) if the Respondent had merely relocated its 14 union employees at the former Metro facility, rather than the other way around; [FN11]

(2) if the Respondent had chosen to shut down its business temporarily and lay off its unit employees before the Metro purchase, and then reopened on November 2 with its 14 recalled mechanics and the newly-hired 14 Metro mechanics, [FN12]

(3) if the Respondent had continued to recognize the Union and applied the collective-bargaining agreement to the combined unit of mechanics after November 2; [FN13]

(4) if the Respondent had subcontracted the bargaining unit work and laid off all of its mechanics prior to purchasing Metro, and then recaptured the work as of November 2 using the 14 Metro mechanics and 14 of its own recalled mechanics; [FN14] and

(5) if, after November 2, an RC petition, or an RM petition, or a decertification petition had been filed under Section 9. [FN15]

Finally, if the Respondent had decided to hire 14 mechanics off the street on November 2 to perform bargaining-unit work, rather than bringing in the Metro mechanics as a group, it is indisputable that these new employees' terms and conditions of employment would be covered by the parties' agreement. Gourmet Award Foods, Northeast, 336 NLRB 872, 873 (2001); Meyer's Cafe & Konditorei, 282 NLRB 1 fn. 1 (1986).

Any purported distinction between these situations and what occurred here is particularly inscrutable. [FN16] In these situations, any attempt by the Respondent to refuse to apply the contract to the Metro employees, or to deny recognition to the Union, would violate the Act. The majority opinion, of course, does not follow this legal pattern. It is the majority's obligation to explain why this is so, to reconcile conflicting doctrines, and to justify its decision in light of the Act's principles and policies.

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[FN17] They have not satisfied this obligation. [FN18]

***18** The majority asserts that sound policy considerations support the Respondent's withdrawal of recognition. In its view, the "express" Section 7 right of the Metro employees to choose or reject union representation must prevail over the "implicit" policy of collective-bargaining stability. But the majority's underlying premise--that the Act itself makes employee free choice (as the majority understands it) the primary statutory policy--is clearly mistaken. Section 1 of the Act establishes not only that economic stability through collective-bargaining is an explicit policy goal, but that it is to be considered together with the protection of employees' Section 7 rights. [FN19]

In any case, the result reached is simply not an appropriate policy determination. It serves neither employee free choice, nor bargaining stability. "The object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employers." Auciello, above, 517 U.S. at 785. Here, in contrast, the majority permits an employer to assert for itself employees' statutory right to choose or reject union representation. The Supreme Court has told us that this management stance is "inimical" [FN20] to the goal of promoting industrial peace and is "entitled to suspicion" [FN21] on the part of the Board.

In this case, the employer itself engineered the "consolidation" the majority seizes upon. And it was the employer who decided not only that the collective bargaining agreement would no longer apply, but also that employees would no longer be represented by the Union at all. There is no evidence at all of the employees' actual wishes. To justify this result in terms of employee free choice is absurd.

IV. CONCLUSION

In the past, the Board has recognized that it is "not free to adopt and apply principles that are 'fundamentally inconsistent with the structure of the Act and the function of the sections relied upon.'" John Deklewa & Sons, 282 NLRB 1375, 1385 (1987), enfd. sub nom. Iron Workers Local 3 v. NLRB, 843 F.2d 770 (3d Cir. 1988), quoting American Ship Building v. NLRB, 380 U.S. 300, 318 (1965). The majority opinion in this case, and the small pocket of cases it relies on, do exactly that. Accordingly, I dissent.

Dated, Washington, D.C. August 27, 2005

Wilma B. Liebman

Member

FN1. As discussed below, to assume that the new employees want union representation proportionately with the existing unit employees is consistent with well-established legal presumptions. To assume to the contrary is without any basis in fact and law. (See fn. 10 infra.) At most, the transaction here created a question concerning representation, which would have permitted the holding of an election, notwithstanding the contract bar. While that itself is a dubious proposition, there is certainly no basis under existing law to allow the employer unilaterally to withdraw recognition without any evidence that the Union has lost the support of a majority of the bargaining unit.

FN2. See, e.g., El Torito-La Fiesta Restaurants, 295 NLRB 493, 494-496 (1989), enfd. 929 F.2d 490 (9th Cir. 1991); Westwood Import Co., 251 NLRB 1213, 1213-1214 (1980), enfd. 681 F.2d 664 (9th Cir. 1982); Hexton, above, 111 NLRB at 343-344.

FN3. Hexton, above, 111 NLRB at 344.

FN4. More specifically, a contract will not bar an election if executed "prior to a substantial increase in personnel," i.e., where less than "30 percent of the

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complement employed at the time of the hearing had been employed at the time the contract was executed," and less than "50 percent of the job classifications in existence at the time of the hearing were in existence at the time the contract was executed." General Extrusion, above, 121 NLRB at 1167. In addition, a contract will not bar an election petition "if changes have occurred in the nature as distinguished from the size" of the employer's business, such as "a merger of two or more operations resulting in creation of an entirely new operation with major personnel changes." Id

FN5. See Brooks v. NLRB, 348 U.S. 96 (1954), cited in Auciello, above, at 786.

FN6. The single case the Board relied on to find that the employer's security force had "precipitously" increased was Westinghouse Electric and Manufacturing Co., 38 NLRB 404 (1942). In Westinghouse, an expanding-unit case, the Board decided to suspend the application of the certification-bar rule because it was anticipated that the employer's work force would quadruple in size within a short period of time. This is a far cry from Renaissance, where the employer's guard complement no more than doubled. Moreover, the Board's finding that the certified unit's identity had been "obscured" because of the mingling of the two groups belies the fact that after the consolidation the combined group performed the same work that the unit employees had done before in substantially the same security operation. Thus there was neither an extraordinary increase in the size of the unit, nor an extraordinary change in the nature of the employer's operation. See General Extrusion, 121 NLRB at 1167.

FN7. "In relocation cases ... our task is to distinguish situations where the new facility is basically the same operation, simply removed to a new site, from those where the new facility is somehow a different operation from the original. In the former case, a collective-bargaining agreement in effect at the old location is logically applied at the new one.... [W]e have developed standards in our contract-bar and failure-to-bargain cases to determine when there is a sufficient continuity of operations to justify applying an existing agreement to a new location. These cases hold that an existing contract will remain in effect after a relocation if the operations at the new facility are substantially the same as those at the old and if transferees from the old plant constitute a substantial percentage--approximately 40 percent or more--of the new plant employee complement." Harte & Co., 278 NLRB at 948, citing Westwood Import Co., and General Extrusion Co.

FN8. The Board in Hamilton also relied on Abbott-Northwestern Hospital, 274 NLRB 1063 (1985). In Abbott-Northwestern, the Board found that the respondent did not unlawfully withdraw recognition after 9 bargaining-unit employees were combined with 63 nonunion employees. The Hamilton Board did not remark on the grossly different proportion of union to nonunion employees in Abbott, 9 of 72, compared with the warehouse employee combination, 2 of 4. The Abbott proportion is consistent with an extraordinary unit expansion under General Extrusion; the proportion in Hamilton is not.

FN9. Remarkably, the majority applies the "restrictive" policy governing accretion principles to conclude that employees have lost interest in representation and the original 40-year-old bargaining unit has ceased to exist. This is a strange application of the accretion doctrine, particularly when no worker has expressed disinterest in representation. The essential statement of the "restrictive" policy is set forth in Melbet Jewelry Co., 180 NLRB 107, 110 (1969):

> [The Board] will not ... under the guise of accretion, compel a group of employees, who may constitute a separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret election or by some other evidence that they wish to authorize the Union to represent them.

(emphasis added). There is no evidence on this

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record that the Metro employees could stand separately as an appropriate unit in the Respondent's employ. The evidence clearly suggests the opposite: the Respondent hired them to do exactly the same work under exactly the same conditions as the original Nott bargaining-unit employees.

FN10. Even if, for some reason, the conclusive presumption were not applicable in this case, a rebuttable presumption of the Union's continuing majority status would be in effect. See, e.g., Auciello, above, 517 U.S. at 786-787. The Respondent provided no evidence to rebut the presumption. The mere fact that unrepresented Metro employees joined the bargaining unit in numbers equal to those unit employees already working does not rebut the presumption. Employees new to the bargaining unit are presumed to support the union in the same proportion as those employees with more seniority. Pioneer Inn, 228 NLRB 1263, 1266 (1977), enfd. 578 F.2d 835 (9th Cir. 1978). The Board has never presumed that new unit employees do not support the Union. J.R. f2Simplot Co., 311 NLRB 572, 588 (1993). Indeed, it is precisely this presumption that the Supreme Court rejected even when strike replacements are hired into the unit. NLRB v. Curtin Matheson Scientific, 494 U.S. 775, 796 (1990).

FN11. See, e.g., Rock Bottom Stores, 312 NLRB 400 (1993), enfd. 51 F.3d 366 (2d Cir. 1995); Westwood Import Co., 251 NLRB 1213 (1980), enfd. 681 F.2d 664 (9th Cir. 1982).

FN12. El Torito-La Fiesta Restaurants, 295 NLRB 493 (1989), enfd. 929 F.2d 490 (9th Cir. 1991).

FN13. See Coastal Cargo Co., 286 NLRB 200, 204 (1987) (dismissing unfair labor practice charge alleging unlawful recognition of minority union); Herman Brothers, Inc., 264 NLRB 439, 441 (1982) (and cases cited).

FN14. F & A Food Sales, 325 NLRB 513 (1998), enfd. 202 F.3d 1258 (10th Cir. 2000).

FN15. Bowman Dairy Co., 123 NLRB 707 (1959); General Extrusion Co., 121 NLRB 1165 (1958).

FN16. I especially fail to see how one set of rules can apply to a consolidation (unrepresented employees join existing unit at old location) and another to a relocation (existing unit employees move to new facility joining unrepresented employees). Surely, the direction of the move cannot be legally significant.

The majority seeks to distinguish the "relocation situation," citing Harte & Co., 278 NLRB 947 (1986), because, it suggests, in a relocation the bargaining unit simply moves to a new site, without the involvement of additional employees. That mischaracterizes Harte & Co., where bargaining unit employees were not merely moved from one location to another. Rather, they were relocated and combined with a new group of employees at a new facility, where they constituted about 40 percent of the total new plant employee complement. Accordingly, the Board held, the existing collective bargaining agreement lawfully remained in effect as to all in the combined unit. Id. at 948-949.

Likewise, the majority seeks to distinguish the shutdown and reopening situation, citing El Torito-LaFiesta Restaurants, above, on the grounds that there had "only been a temporary hiatus in operations." Again that mischaracterizes El Torito-LaFiesta, where, after operations resumed, laid-off bargaining-unit employees were combined with a new, much larger group of employees. Nonetheless, the Board held, the existing labor contract was lawfully applied to the combined complement. These situations cannot be coherently distinguished from the present case.

FN17. See, e.g., Thomas-Davis Medical Centers, P.C. v. NLRB, 157 F.3d 909, 914 (D.C. Cir. 1998) (Board must provide "a reasoned explanation" when it departs from established policy or precedent).

FN18. The majority says it will "not reach out to reverse ... precedent sua sponte," observing that the "law goes as far back as 26 years," that the "one case

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that was judicially tested was affirmed," and that "[n]o party seeks the reversal of this precedent." I agree that all three factors--the age of a decision, its judicial reception, and the positions of the parties--are relevant in deciding whether to overrule precedent. In this case, however, those factors are clearly outweighed by the Board's duty to bring coherence to its legal rules, by correcting past errors and resolving doctrinal contradictions. We cannot delegate that responsibility to the courts or to the parties. The much-quoted observation of Justice Holmes is apt here: it is "revolting" to follow a doctrine only "from blind imitation of the past." Holmes, "The Path of the Law," 10 Harv. L. Rev. 457, 469 (1897). As this case illustrates, one bad decision may well lead to another and another, until Board law appears arbitrary.

FN19. The relevant portion of Sec. 1 states:

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

28 U.S.C. Sec. 151 (emphasis added).

FN20. Brooks, above, 348 U.S. at 103.

FN21. Auciello, above, 517 U.S. at 790.

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